THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1996 CUMULATIVE SUPPLEMENT

Volume 8

Chapters 41A through 52C

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 470 S.E.2d 425. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 8 contains the general laws of a permanent nature enacted by the General Assembly through the 1996 Second Extra Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1996 Second Extra Session affecting Chapters 41A through 52B of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 343, p. 303.
North Carolina Court of Appeals Reports through Volume 121, p. 513.
South Eastern Reporter 2nd Series through Volume 470, p. 425.
Federal Reporter 3rd Series through Volume 83, p. 1423.
Federal Supplement through Volume 924, p. 224.
Federal Rules Decisions through Volume 165, p. 700.
Bankruptcy Reports through Volume 195, p. 823.
Supreme Court Reporter through Volume 116, p. 1711.
North Carolina Law Review through Volume 74, p. 1319.
Wake Forest Law Review through Volume 30, p. 1008.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

The General Statutes of North Carolina
1996 Cumulative Supplement

VOLUME 8

Chapter 41A.
State Fair Housing Act.

§ 41A-4. Unlawful discriminatory housing practices.

CASE NOTES

In order for this Act to apply, the discriminatory housing practice must first: (1) occur in a "real estate transaction", and (2) discriminate "because of" one of the reasons listed in this section. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

Defendants failed to meet the threshold question of showing that plaintiff did not allow defendants to place a mobile home on the property "because of" defendant's handicapping condition. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

§ 41A-7. Enforcement.

Legal Periodicals. — For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

Chapter 42.

Landlord and Tenant.

Article 2A.

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42-57, 42-58. [Reserved.]

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42-71. Protection of threatened witnesses or affiants.
42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs.
42-73. Collection of rent.
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42-75. Cumulative remedies.
42-76. Civil immunity.

Article 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter. (1981, c. 566, s. 1; 1995, c. 419, s. 1.1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to acts committed on or after that date, added "or Article 7".

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

North Carolina law requires eviction of residential tenants to be accomplished through court action; thus, in federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed and whether termination of the lease is permissible. Charlotte Hous. Auth. v. Patterson, 120 N.C. App. 552, 464 S.E.2d 68 (1995).

§ 42-25.7. Distress and distraint not permitted.

It is the public policy of the State of North Carolina that distress and distraint are prohibited and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2. (1981, c. 566, s. 1; 1995, c. 460, s. 8.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, substituted "rights concerning" for "security interests or liens on", and "G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 44A-2(e)".

§ 42-25.9. Remedies.

(a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2 the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(c) The remedies created by this section are supplementary to all existing common-law and statutory rights and remedies.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S.42-25.9(g), 42-25.9(h), or 42-36.2, deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days.

(g) Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. If the landlord elects to sell the property at public or private sale, the landlord shall give written notice to the tenant by first-class mail to the tenant's last known address at least seven days prior to the day of the sale. The seven-day notice of sale may run concurrently with the 10-day period which allows the tenant to request possession of the property. The written notice shall state the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, storage fees, and sale costs, shall be disbursed to the tenant, upon request, within 10 days after the sale, and will thereafter be delivered to the government of the county in which the rental property is located. Upon the tenant's request prior to the day of sale, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. The landlord may apply the proceeds of the sale to the unpaid rents, damages, storage fees, and sale costs. Any surplus from the sale shall be disbursed to the tenant, upon request, within 10 days of the sale and shall thereafter be delivered to the government of the county in which the rental property is located.

(h) If the total value of all property remaining on the premises at the time of execution of a writ of possession in an action for summary ejectment is less than one hundred dollars ($100.00), then the property shall be deemed abandoned five days after the time of execution, and the landlord may throw away or dispose of the property. Upon the tenant's request prior to the expiration of the five-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. (1981, c. 566, s. 1; 1985, c. 612, ss. 1-4; 1995, c. 460, ss. 1-3.)

Effect of Amendments. — Session Laws 1995, c. 460, ss. 1, 2 and 3, effective January 1, 1996, substituted "G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 44A-2(e) or 42-25.9(d)" in subsection (b); substituted "G.S. 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 42-36.2 or G.S. 44A-2(e)" in subsection (d); and added subsections (g) and (h).

CASE NOTES

Recovery of Treble Damages and Attorney's Fees. — The prohibition against punitive or treble damages in wrongful eviction actions contained in subsection (a) does not preclude tenants from recovering treble damages under § 75-16 and attorney's fees under § 75-16.1 of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Article 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

OPINIONS OF ATTORNEY GENERAL

Summary ejectment proceedings are a landlord's exclusive remedy to regain possession of his property; the General Assembly did not intend for other statutory provisions, such as § 1-111, to apply to summary ejectment proceedings. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

The only undertaking the General Assembly intended to require of the defendants is the rent undertaking that § 42-34 provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

A summary ejectment action heard by a magistrate is an expedited judicial proceeding; under § 7A-214, the trial of a small claim summary ejectment action is set no more than 30 days after the action is commenced. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Pleadings in small claim summary ejectment actions are the same as in other small claim actions. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Safety, — N.C.A.G. — (February 10, 1995).

A defendant is not required to file any pleading at all to maintain a defense in a summary ejectment proceeding. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Defendants in summary ejectment actions are not required to post bond before pleading, pursuant to § 1-111. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-27. Local: Refusal to perform contract ground for dispossession.

When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Swain, Tyrrell, Union, Wake, Warren, Washington, Wayne, Wilson, Yadkin. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001, subsec. 4; 1907, cc. 43, 153; 1909, cc. 40, 550; C.S., s. 2366; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459; 1951, c. 279; 1953, c. 271; c. 499, s. 2; 1955, c. 93; 1961, c. 25; 1995 (Reg. Sess., 1996), c. 566, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 19, 1996, and applicable to contracts entered into on or after that date, inserted "New Hanover."

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed the jurisdictional amount established by G.S. 7A-210(1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C.S., s. 2367; 1971, c. 533, s. 4; 1973, c. 1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4; 1983, c. 332, s. 2; 1985, c. 329, s. 1; 1989, c. 311, s. 3; 1993, c. 553, s. 73(c); 1995, c. 460, s. 4.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in the first sentence substituted "seven days" for "10 days", and added "excluding weekends and legal holidays".

§ 42-29. Service of summons.

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C.S., s. 2368; 1973, c. 87; 1983, c. 332, s. 1; 1985, c. 102; 1995, c. 460, s. 5.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in the first sentence added "no later than the end of the next business day or as soon as practicable", and substituted "the defendant's" for "his", added "within five days of the issuance of the summons" in the second sentence, and in the third sentence added "or does not result in service to the defendant" and "within five days of the issuance of the summons".

§ 42-30. Judgment by confession or where plaintiff has proved case.

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-31. Trial by magistrate.

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-34. Undertaking on appeal and order staying execution.

CASE NOTES

Plaintiff was not required to comply with this section in order to perfect her appeal, because this section only provides the mechanism for an appellant to stay execution of the magistrate's judgment pending the appeal. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

OPINIONS OF ATTORNEY GENERAL

The only undertaking the General Assembly intended to require of summary ejectment defendants is the rent undertaking that this section provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-36.1A. Judgments for possession more than 30 days old.

Prior to obtaining execution of a judgment that has been entered for more than 30 days for possession of demised premises, a landlord shall sign an affidavit stating that the landlord has neither entered into a formal lease with the defendant nor accepted rental money from the defendant for any period of time after entry of the judgment. (1995, c. 460, s. 7.)

Editor's Note. — Session Laws 1995, c. 460, s. 10, made this section effective January 1, 1996.

§ 42-36.2. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property.

(a) When Sheriff May Remove Property. — Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

(1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or

(2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff May Store Property. — When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. Within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the Sheriff. — A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice. — The notice required by subsection (a) shall inform the tenant that failure to request possession of any property on the premises within 10 days of execution may result in the property being thrown away, disposed of, or sold. Notice shall be made by one of the following methods:

(1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;

(2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or

(3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ. (1983, c. 672, s. 1; 1995, c. 460, s. 6.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in subsection (a) divided the former first sentence into the present first and second sentences, deleted "to" from the end of the present first sentence, and added "The time within which the sheriff shall have to execute the writ shall" in the present second sentence; in subsection (b) added the fifth, sixth and seventh sentences, and added "If the tenant does not request release of the property within 10 days" in the eighth sentence; and added the language beginning "inform the tenant" and ending "Notice shall" in the introductory language of subsection (d).

CASE NOTES

Attempted Delivery Held Sufficient. — An attempt to deliver notice was sufficient where the evidence showed that the sheriff's department attempted to deliver notice of the writ two days prior to its execution and the party to be evicted evaded or prevented the delivery of the notice. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Conversion Not Found. — Where the evidence sufficiently demonstrated that defendant obtained plaintiff's personal property in accord with statutorily mandated procedures under § 45-21.29(1) and this section, it did not convert plaintiff's property by removing and storing it. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

ARTICLE 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-37.2. Remedies.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

ARTICLE 5.

Residential Rental Agreements.

§ 42-38. Application.

CASE NOTES

Cited in Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition;

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that

notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations; and

(5) Provide operable smoke detectors, either battery- operated or electrical, having an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, that are installed in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord must replace or repair the smoke detectors provided the landlord is notified of needed replacement or repairs in writing by the tenant. Unless the landlord and the tenant have a written agreement to the contrary, the landlord must place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant must replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1; 1995, c. 111, s. 2.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to residential rental agreements in effect on or after that date, deleted "and" from the end of subdivision (a)(3); added "and" to the end of subdivision (a)(4); and added subdivision (a)(5).

Legal Periodicals. —

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

Breach of the Implied Warranty of Habitability. — Court's conclusion that the amount of rent owed by defendant abated in compensation for plaintiff's violations of housing code, pursuant to this section, mandated a further conclusion that plaintiff violated subsections (a)(1), (2), and (3) and hence breached the implied warranty of habitability. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Rent Abatement Allowed for Unfit Apartment. —

Where the court should have found that plaintiff breached the implied warranty of habitability it was error to not award abatement damages to defendants for that breach. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Efforts to Repair Did Not Preclude Rent Abatement. — Where plaintiff violated this section, the trial court could not deny rent abatements for two months because of plaintiff's reasonable efforts to repair during those months. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 42-43. Tenant to maintain dwelling unit.

(a) The tenant shall:

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector provided by the landlord, or knowingly permit any person to do so;

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes;

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces; and

(7) Notify the landlord of the need for replacement of or repairs to a smoke detector. Nothing in this bill shall prohibit an individual landlord in a written agreement with the tenant from requiring the tenant to provide notice in writing of the need for replacement of or repairs to a smoke detector. Unless the landlord and the tenant have a written agreement to the contrary, the landlord must place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant must replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1; 1995, c. 111, s. 3.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to residential rental agreements in effect on or after that date, inserted "nor render inoperable the smoke detector provided by the landlord" following "premises" in subdivision (a)(4); and added subdivision (a) (7) and made related changes.

Article 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-56. Application of Article.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§§ 42-57, 42-58: Reserved for future codification purposes.

Article 7.

Expedited Eviction of Drug Traffickers and Other Criminals.

§ 42-59. Definitions.

As used in this Article:

(1) "Complete eviction" means the eviction and removal of a tenant and all members of the tenant's household.

(2) "Criminal activity" means (i) activity that would constitute a violation of G.S. 90-95 other than a violation of G.S. 90-95(a)(3), or a conspiracy to violate any provision of G.S. 90-95 other than G.S. 90-95(a)(3); or (ii) other criminal activity that threatens the health, safety, or right of peaceful enjoyment of the entire premises by other residents or employees of the landlord.

(3) "Entire premises" or "leased residential premises" means a house, building, mobile home, or apartment, whether publicly or privately owned, which is leased for residential purposes. These terms include the entire building or complex of buildings or mobile home park and all real property of any nature appurtenant thereto and used in connection therewith, including all individual rental units, streets, sidewalks, and common areas. These terms do not include a hotel, motel, or other guest house or part thereof rented to a transient guest.

(4) "Felony" means a criminal offense that constitutes a felony under North Carolina law.

(5) "Guest" means any natural person who has been given express or implied permission by a tenant, a member of the tenant's household, or another guest of the tenant to enter an individual rental unit or any portion of the entire premises.

(6) "Individual rental unit" means an apartment or individual dwelling or accommodation which is leased to a particular

tenant, whether or not it is used or occupied or intended to be used or occupied by a single family or household.

(7) "Landlord" means a person, entity, corporation, or governmental authority or agency who or which owns, operates, or manages any leased residential premises.

(8) "Partial eviction" means the eviction and removal of specified persons from a leased residential premises.

(9) "Resident" means any natural person who lawfully resides in a leased residential premises who is not a signatory to a lease or otherwise has no contractual relationship to a landlord. The term includes members of the household of a tenant.

(10) "Tenant" means any natural person or entity who is a named party or signatory to a lease or rental agreement, and who occupies, resides in, or has a legal right to possess and use an individual rental unit. (1995, c. 419, s. 1.)

Editor's Note. — Session Laws 1995, c. 419, s. 3, provides that this Article is effective October 1, 1995, and is applicable to acts committed on or after that date.

Session Laws 1995, c. 419, s. 2 contains a severability clause.

§ 42-59.1. Statement of Public Policy.

The General Assembly recognizes that the residents of this State have the right to the peaceful, safe, and quiet enjoyment of their homes. The General Assembly further recognizes that these rights, as well as the health, safety, and welfare of residents, are often jeopardized by the criminal activity of other residents of rented residential property, but that landlords are often unable to remove those residents engaged in criminal activity. In order to ensure that residents of this State can have the peaceful, safe, and quiet enjoyment of their homes, the provisions of this Article are deemed to apply to all residential rental agreements in this State. (1995, c. 419, s. 1.)

§ 42-60. Nature of actions and jurisdiction.

The causes of action established in this Article are civil actions to remove tenants or other persons from leased residential premises. These actions shall be brought in the district court of the county where the individual rental unit is located. If the plaintiff files the complaint as a small claim, the parties shall not be entitled to discovery from the magistrate. However, if such a case is filed originally in the district court or is appealed from the judgment of a magistrate for a new trial in the district court, all of the procedures and remedies in this Article shall be applicable. (1995, c. 419, s. 1.)

§ 42-61. Standard of proof.

The civil causes of action established in this Article shall be proved by a preponderance of the evidence, except as otherwise expressly provided in G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-62. Parties.

(a) Who May Bring Action. — A civil action pursuant to this Article may be brought by the landlord of a leased residential premises, or the landlord's agent, as provided for in G.S. 1-57 of the General Statutes and in Article 3 of this Chapter.

(b) Defendants to the Action. — A civil action pursuant to this Article may be brought against any person within the jurisdiction of the court, including a tenant, adult or minor member of the tenant's household, guest, or resident of the leased residential premises. If any defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him or her.

(c) Notice to Defendants. — A complaint initiating an action pursuant to this Article shall be served in the same manner as serving complaints in civil actions pursuant to G.S. 1A-1, Rule 4 and G.S. 42-29. (1995, c. 419, s. 1.)

§ 42-63. Remedies and judicial orders.

(a) Grounds for Complete Eviction. — Subject to the provisions of G.S. 42-64 and pursuant to G.S 42-68, the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit where it finds that:

(1) Criminal activity has occurred on or within the individual rental unit leased to the tenant; or

(2) The individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity; or

(3) The tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(4) The tenant has given permission to or invited a person to return or reenter any portion of the entire premises, knowing that the person has been removed and barred from the entire premises pursuant to this Article or the reasonable rules and regulations of a publicly assisted landlord; or

(5) The tenant has failed to notify law enforcement or the landlord immediately upon learning that a person who has been removed and barred from the tenant's individual rental unit pursuant to this Article has returned to or reentered the tenant's individual rental unit.

(b) Grounds for Partial Eviction and Issuance of Removal Orders. — The court shall, subject to the provisions of G.S. 42- 64, order the immediate removal from the entire premises of any person other than the tenant, including an adult or minor member of the tenant's household, where the court finds that such person has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises. Persons removed pursuant to this section shall be barred from returning to or reentering any portion of the entire premises.

(c) Conditional Eviction Orders Directed Against the Tenant. — Where the court finds that a member of the tenant's household or a guest of the tenant has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises, but such person has not been named as a party defendant, has not appeared in the action or otherwise has not been subjected to the jurisdiction of the court, a conditional eviction order issued pursuant to subsection (b) of this section shall be directed against the tenant, and shall provide that as an express condition of the tenancy, the tenant shall not give permission to or invite the barred person or persons to return to or reenter any portion of the entire premises. The tenant shall acknowledge in writing that the tenant understands the terms of the court's order, and that the tenant further understands that the failure to comply with the court's order will result in the mandatory termination of the tenancy pursuant to G.S. 42-68. (1995, c. 419, s. 1.)

§ 42-64. Affirmative defense or exemption to a complete eviction.

(a) Affirmative Defense. — The court shall refrain from ordering the complete eviction of a tenant pursuant to G.S. 42- 63(a) where the tenant has established that the tenant was not involved in the criminal activity and that:

(1) The tenant did not know or have reason to know that criminal activity was occurring or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(2) The tenant had done everything that could reasonably be expected under the circumstances to prevent the commission of the criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

Notwithstanding the court's denial of eviction of the tenant, if the plaintiff has proven that an evictable offense under G.S. 42- 63 was committed by someone other than the tenant, the court shall order such other relief as the court deems appropriate to protect the interests of the landlord and neighbors of the tenant, including the partial eviction of the culpable household members pursuant to G.S. 42-63(b) and conditional eviction orders under G.S. 42-63(c).

(b) Subsequent Affirmative Defense to a Complete Eviction. — The affirmative defense set forth in subsection (a) of this section shall not be available to a tenant in a subsequent action brought pursuant to this Article unless the tenant can establish by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second criminal activity.

(c) Exemption. — Where the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, taking into account the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises. The burden of proof for the exemption set forth shall be by clear and convincing evidence. (1995, c. 419, s. 1.)

§ 42-65. Obstructing the execution or enforcement of a removal or eviction order.

Any person who knowingly violates any order issued pursuant to this Article or who knowingly interferes with, obstructs, impairs, or prevents any law enforcement officer from enforcing or executing any order issued pursuant to this Article, shall be subject to criminal contempt under Article 1 of Chapter 5A of the General Statutes. Nothing in this section shall be construed in any way to preclude or preempt prosecution for any other criminal offense. (1995, c. 419, s. 1.)

§ 42-66. Motion to enforce eviction and removal orders.

(a) A motion to enforce an eviction or removal order issued pursuant to G.S. 42-63(b) or (c) shall be heard on an expedited basis and within 15 days of the service of the motion.

(b) Mandatory Eviction. — The court shall order the immediate eviction of the tenant where it finds that:

(1) The tenant has given permission to or invited any person removed or barred from the leased residential premises pursuant to this Article to return to or reenter any portion of the premises; or

(2) The tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred pursuant to this Article has returned to or reentered the tenant's individual rental unit; or

(3) The tenant has otherwise knowingly violated an express term or condition of any order issued by court pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-67. Impermissible defense.

It shall not be a defense to an action brought pursuant to this Article that the criminal activity was an isolated incident or otherwise has not recurred. Nor is it a defense that the person who actually engaged in the criminal activity no longer resides in the tenant's individual rental unit. However, evidence of such facts may be admissible if offered to support affirmative defenses or grounds for an exemption pursuant to G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-68. Expedited proceedings.

Where the complaint is filed as a small claim, the expedited process for summary ejectment, as provided in Article 3 of this Chapter and Chapter 7A of the General Statutes, applies. Where the complaint is filed initially in the district court or a judgment by the magistrate is appealed to the district court, the procedure in G.S. 42-34(b) through (g), if applicable, and the following procedures apply:

(1) Expedited Hearing. — When a complaint is filed initiating an action pursuant to this Article, the court shall set the matter for a hearing which shall be held on an expedited basis and within the first term of court falling after 30 days from the service of the complaint on all defendants or from service of notice of appeal from a magistrate's judgment, unless either party obtains a continuance. However, where a defendant files a counterclaim, the court shall reset the trial for the first term of court falling after 30 days from the defendant's service of the counterclaim.

(2) Standards for Continuances. — The court shall not grant a continuance, nor shall it stay the civil proceedings pending the disposition of any related criminal proceedings, except as required to complete permitted discovery, to have the plaintiff reply to a counterclaim, or for compelling and extraordinary reasons or on application of the district attorney for good cause shown.

(3) When Presented. — The defendant in an action brought in district court pursuant to this Article shall serve an answer within 20 days after service of the summons and complaint, or within 20 days after service of the appeal to district court when the action was initially brought in small claims court. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer.

(4) Extensions of Time for Filing. — The parties to an action brought pursuant to this Article shall not be entitled to an extension of time for completing an act required by subdivision (3) of this section, except for compelling and extraordinary reasons.

(5) Default. — A party to an action brought pursuant to this Article who fails to plead in accordance with the time periods in subdivision (3) of this section shall be subject to the provisions of G.S. 1A-1, Rule 55.

(6) Rules of Civil Procedure. — Unless otherwise provided for in this Article, G.S. 1A-1, the Rules of Civil Procedure, shall apply in the district court to all actions brought pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-69. Relation to criminal proceedings.

(a) Criminal Proceedings, Conviction, or Adjudication Not Required. — The fact that a criminal prosecution involving the criminal activity is not commenced or, if commenced, has not yet been concluded or has terminated without a conviction or adjudication of delinquency shall not preclude a civil action or the issuance of any order pursuant to this Article.

(b) Effect of Conviction or Adjudication. — Where a criminal prosecution involving the criminal activity results in a final criminal conviction or adjudication of delinquency, such adjudication or conviction shall be considered in the civil action as conclusive proof that the criminal activity occurred.

(c) Admissibility of Criminal Trial Recordings or Transcripts. — Any evidence or testimony admitted in the criminal proceeding, including recordings or transcripts of the adult or juvenile criminal proceedings, whether or not they have been transcribed, may be admitted in the civil action initiated pursuant to this Article.

(d) Use of Sealed Criminal Proceeding Records. — In the event that the evidence or records of a criminal proceeding which did not result in a conviction or adjudication of delinquency have been sealed by court order, the court in a civil action brought pursuant to this Article may order such evidence or records, whether or not they have been transcribed, to be unsealed if the court finds that such evidence or records would be relevant to the fair disposition of the civil action. (1995, c. 419, s. 1.)

§ 42-70. Discovery.

(a) The parties to an action brought pursuant to this Article shall be entitled to conduct discovery, if the action is filed originally in or appealed to the district court, only in accordance with this section.

(b) Any defendant must initiate all discovery within the time allowed by this Article for the filing of an answer or counterclaim.

(c) The plaintiff must initiate all discovery within 20 days of service of an answer or counterclaim by a defendant.

(d) All parties served with interrogatories, requests for production of documents, and requests for admissions under G.S. 1A-1, Rules 33, 34, and 36 shall serve their responses within 20 days.

(e) Upon application by the plaintiff, or agreement of the parties, the court shall issue a preliminary injunction against all alleged illegal activity by the defendant or other identified parties who are residents of the individual rental unit or guests of defendants, pending the completion of discovery and any other wait before the trial has occurred. (1995, c. 419, s. 1.)

§ 42-71. Protection of threatened witnesses or affiants.

If proof necessary to establish the grounds for eviction depends, in whole or in part, upon the affidavits or testimony of witnesses who are not peace officers, the court may, upon a showing of prior threats of violence or acts of violence by any defendant or any other person, issue orders to protect those witnesses, including the nondisclosure of the name, address, or any other information which may identify those witnesses. (1995, c. 419, s. 1.)

§ 42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs.

A law enforcement agency may make available to any person or entity authorized to bring an action pursuant to this Article any police report or edited portion thereof, or forensic laboratory report or edited portion thereof, concerning criminal activity committed on or in the immediate vicinity of the leased residential premises. A law enforcement agency may also make any officer or officers available to testify as a fact witness or expert witness in a civil action brought pursuant to this Article. The agency shall not disclose such information where, in the agency's opinion, such disclosure would jeopardize an investigation, prosecution, or other proceeding, or where such disclosure would violate any federal or State statute. (1995, c. 419, s. 1.)

§ 42-73. Collection of rent.

A landlord shall be entitled to collect rent due and owing with knowledge of any illegal acts that violate the provisions of this act without such collection constituting a waiver of the alleged defaults. (1995, c. 419, s. 1.)

§ 42-74. Preliminary or emergency relief.

The district court shall have the authority at any time to issue a temporary restraining order, grant a preliminary injunction, or take such other actions as the court deems necessary to enjoin or prevent the commission of criminal activity on or in the immediate vicinity of leased residential premises, or otherwise to protect the rights and interests of all tenants and residents. A violation of any such duly issued order or preliminary relief shall subject the violator to civil or criminal contempt. (1995, c. 419, s. 1.)

§ 42-75. Cumulative remedies.

The causes of action and remedies authorized by this Article shall be cumulative with each other and shall be in addition to, not in lieu of, any other causes of action or remedies which may be available at law or equity, including causes of action and remedies based on express provisions of the lease not contrary to this Article. (1995, c. 419, s. 1.)

§ 42-76. Civil immunity.

Any person or organization who, in good faith, institutes, participates in, or encourages a person or entity to institute or participate in a civil action brought pursuant to this Article, or who in good faith provides any information relied upon by any person or entity in instituting or participating in a civil action pursuant to this Article shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such person or organization shall have the same immunity from civil liability with respect to testimony given in any judicial proceeding conducted pursuant to this Article. (1995, c. 419, s. 1.)

Chapter 43.

Land Registration.

Article 8.

Assurance Fund.

Sec.
43-51. Satisfaction by third person or by Treasurer.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 3.

Procedure for Registration.

§ 43-12. Effect of decree; approval of judge.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 4.

Registration and Effect.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 43-21. No right by adverse possession.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 8.

Assurance Fund.

§ 43-51. Satisfaction by third person or by Treasurer.

If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C.S., s. 2424; 1993, c. 257, s. 1.)

Chapter 44.

Liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

Sec.
44-49.1. [Recodified.]
44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

44-51.8. Counties to which Article applies.

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

Section 44-50 must be read in conjunction with this section. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under § 44-50 is to have a lien such as is provided for in this section, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

§ 44-49.1: Recodified as § 58-3-135 by Session Laws 1995 (Regular Session, 1996), c. 674, s. 1.

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2; 1995 (Reg. Sess., 1996), c. 674, s. 3.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 674, s. 3, effective July 1, 1996, repealed the amendment to this section by Session Laws 1995, c. 538, s. 6(b), effective July 1, 1996, which would have inserted "or G.S. 44-49.1" following "G.S. 44-49", inserted "and past-due child support obligations" following "medical attention and/or hospital service", and substituted "moneys" for "damages" following "fifty percent (50%) of the amount of".

CASE NOTES

The Employee Retirement Income Security Act preempts this section, the North Carolina apportionment statute. Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4th Cir. 1992).

This section must be read in conjunction with § 44-49. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under this section is to have a lien such as is provided for in § 44-49, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

ARTICLE 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Craven, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6; 1987, c. 466; 1995, c. 9, s. 1; 1995 (Reg. Sess., 1996), c. 676, s. 1.)

Effect of Amendments. — The 1995 amendment, effective March 13, 1995, inserted Graham and Macon in the list of counties.

The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, inserted Swain in the list of counties.

ARTICLE 12.

Liens on Certain Agricultural Products.

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

CASE NOTES

Applied in United States v. Currituck Grain, Inc., 6 F.3d 200 (4th Cir. 1993).

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Sec.
44A-2. Persons entitled to lien on personal property.
44A-4. Enforcement of lien by sale.

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

44A-7. Definitions.

Sec.
44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

44A-18. Grant of lien; subrogation; perfection.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-2. Persons entitled to lien on personal property.

(a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or
(2) The contract price; or
(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests.

(e) Any lessor of nonresidential demised premises has a lien on all furniture, furnishings, trade fixtures, equipment and other personal property to which the tenant has legal title and which remains on the demised premises if (i) the tenant has vacated the premises for 21 or more days after the paid rental period has expired, and (ii) the lessor has a lawful claim for damages against the tenant. If the tenant has vacated the premises for 21 or more days after the expiration of the paid rental period, or if the lessor has received a judgment for possession of the premises which is executable and the tenant has vacated the premises, then all property remaining on the premises may be removed and placed in storage. If the total value of all property remaining on the premises is less than one hundred dollars ($100.00), then it shall be deemed abandoned five days after the tenant has vacated the premises, and the lessor may remove it and may donate it to any charitable institution or organization. Provided, the lessor shall not have a lien if there is an agreement between the lessor or his agent and the tenant that the lessor shall not have a lien. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at public sale pursuant to the provisions of G.S. 44A-4(e). This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien.

(e1) This Article shall not apply to liens created by storage of personal property at a self-service storage facility.

(f) Any person who improves any textile goods in the ordinary course of his business pursuant to an express or implied contract with the owner or legal possessor of such goods shall have a lien upon all goods of such owner or possessor in his possession for improvement. The amount of such lien shall be for the entire unpaid contracted charges owed such person for improvement of said goods including any amount owed for improvement of goods, the possession of which may have been relinquished, and such lien shall have priority over perfected and unperfected security interests. "Goods" as used herein includes any textile goods, yarns or products of natural or man-made fibers or combination thereof. "Improve" as used herein shall be construed to include processing, fabricating or treating by throwing, spinning, knitting, dyeing, finishing, fabricating or otherwise.

(g) Any person who fabricates, casts, or otherwise makes a mold or who uses a mold to manufacture, assemble, or otherwise make a product pursuant to an express or implied contract with the owner of such mold shall have a lien upon the mold. For a lien to arise under this subsection, there must exist written evidence that the parties understood that a lien could be applied against the mold, with the evidence being in the form either of a written contract or a separate written statement provided by the potential holder of the lien under this subsection to the owner of the mold prior to the fabrication or use of the mold. The written contract or separate written statement must describe generally the amount of the potential lien as set forth in this subsection. The amount of the lien under this subsection shall equal the total of (i) any unpaid contracted charges due from the owner of the mold for making the mold, plus (ii) any unpaid contracted charges for all products made with the mold. The lien under this subsection shall not have priority over any security interest in the mold which is perfected at the time the person acquires this lien. As used in this subsection, the word "mold" shall include a mold, die, form, or pattern. (1967, c. 1029, s. 1; 1971, cc. 261, 403; c. 544, s. 1; c. 1197; 1973, c. 1298, s. 1; 1975, c. 461; 1981, c. 566, s. 2; c. 682, s. 9; 1981 (Reg. Sess., 1982), c. 1275, s. 2; 1995, c. 460, s. 9; c. 480, s. 1; 1995 (Reg. Sess., 1996), c. 744, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to charges incurred on or after that date, added subsection (g).

CASE NOTES

Warehouseman's Lien. — Any rights a warehouseman had to plaintiff's personal property stored in his warehouse were to be analyzed as a warehouseman's lien under chapter 25 rather than as a possessory lien under chapter 44A. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Applied in Marlen C. Robb & Son Boatyard & Marina, Inc. v. Vessel Bristol, 893 F. Supp. 526 (E.D.N.C. 1994).

§ 44A-4. Enforcement of lien by sale.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days or, in the case of towing and storage charges on a motor vehicle, 10 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the relevant time period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of ten dollars ($10.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, within 15 days of receipt of notice from the lienor, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party and other person claiming an interest in the property who is actually known to the Division or who can be reasonably ascertained. The notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired and the Division shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. Failure of the recipient to notify the Division within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, the Division shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by

sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the Division notifies the lienor that the registered or certified mail notice has been returned as undeliverable, or if the Division cannot ascertain the name of the person having legal title to the vehicle and the fair market value of the vehicle is less than eight hundred dollars ($800.00), the lienor may institute a special proceeding in the county where the vehicle is being held, for authorization to sell that vehicle. Market value shall be determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall escheat to the State and be paid immediately to the treasurer for disposition pursuant to Chapter 116B of the General Statutes. A vehicle owner or possessor claiming an interest in such proceeds shall have a right of action under G.S. 116B-38.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person to whom the Division has mailed notice pursuant to this subsection. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that the lienor has complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-399.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall

further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private Sale. — Sale by private sale may be made in any manner that is commercially reasonable. If the property upon which the lien is claimed is a motor vehicle, the sale may not be made until notice is given to the Commissioner of Motor Vehicles pursuant to G.S. 20-114(c). Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for Public Sale. — If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall notify the Commissioner of Motor Vehicles as provided in G.S. 20-114(c) if the property upon which the lien is claimed is a motor vehicle; and

a1. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held;

and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale. The notice of sale need not be published if the vehicle has a market value of less than three thousand five hundred dollars ($3,500), as determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;

(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;

(3) A description of the property;

(4) The amount due for which the lien is claimed;

(5) The place of the sale;

(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for Noncompliance. — If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26; 1983, c. 44, ss. 1, 2; 1985, c. 655, ss. 4, 5; 1989, c. 770, s. 10; 1991, c. 344, s. 1; c. 731, s. 3; 1995 (Reg. Sess., 1996), c. 635, ss. 2 to 4.)

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 635, ss. 2, 3 and 4, effective October 1, 1996, inserted "or, in the case of towing and storage charges on a motor vehicle, 10 days" following "30 days" in the first sentence of subsection (a); in subdivision (b)(1), in the first paragraph, substituted "relevant time" for "30 days" in the first sentence, and inserted "within 15 days of receipt of notice from the lienor" in the second sentence, in the second paragraph, inserted "or if the Division cannot ascertain the name of the person having legal title to the vehicle and the fair market value of the vehicle is less than eight hundred dollars ($800.00)" in the first sentence, and added the second sentence, and, in the fourth paragraph, substituted "the lienor has complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale" for "two or more bona fide bids on the vehicle were received, the names, addresses and bids of the bidders"; and added the second sentence of subdivision (e)(1).

CASE NOTES

Attorney Fees. — Where defendant neither prevailed nor defended under the theory that he had a chapter 44A lien, but it was a warehouseman's lien under chapter 25, the trial court erred by awarding attorney fees under this section. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon. (1969, c. 1112, s. 1; 1975, c. 715, s. 1; 1985, c. 689, s. 13; 1995 (Reg. Sess., 1996), c. 607, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to lien rights that arise on or after that date, inserted "and rental of equipment directly utilized on the real property in making the improvement" following "General Statutes" in subdivision (1).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to such contract. (1969, c. 1112, s. 1; 1975, c. 715, s. 2; 1995 (Reg. Sess., 1996), c. 607, s. 2.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to lien rights that arise on or after that date, inserted "or furnishes rental equipment" following "furnishes materials", and inserted "or equipment rented" following "material furnished".

§ 44A-12. Filing claim of lien.

CASE NOTES

Cited in Vance Constr. Co. v. Eaton Ferry Marina, Inc., 120 N.C. App. 401, 462 S.E.2d 814 (1995); Johnson Neurological Clinic, Inc. v. Kirkman, 121 N.C. App. 326, 465 S.E.2d 32 (1996).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien; subrogation; perfection.

Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the first tier subcontractor with whom the second tier subcontractor dealt and which arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he dealt provided for in subdivision (1) and shall be entitled to perfect it by notice to the extent of his claim.

(3) A third tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the second tier subcontractor with whom the third tier subcontractor

dealt and which arise out of the improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the second tier subcontractor with whom he dealt and to the lien of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice to the extent of his claim.

(4) Subcontractors more remote than the third tier who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the person with whom they dealt and which arise out of the improvement on which they furnished labor, materials, or rental equipment, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens granted under this section shall secure amounts earned by the lien claimant as a result of his having furnished labor, materials, or rental equipment at the site of the improvement under the contract to improve real property, whether or not such amounts are due and whether or not performance or delivery is complete.

(6) A lien upon funds granted under this section is perfected upon the giving of notice in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the lien of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23. (1971, c. 880, s. 1; 1985, c. 702, s. 3; 1995 (Reg. Sess., 1996), c. 607, s. 3.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to lien rights that arise on or after that date, substituted "labor, materials, or rental equipment" for "labor or materials" throughout the section.

Chapter 45.

Editor's Note. The legislation and annotations affecting Chapter 45 have been included in a recently published replacement chapter.

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Sec.
46-3. Petition by cotenant or personal representative of cotenant.
46-10. Commissioners to meet and make partition; equalizing shares.

Article 2.

Partition Sales of Real Property.

Sec.
46-22. Sale in lieu of partition.
46-28. Sale procedure.
46-28.1. Petition for revocation of confirmation order.
46-28.2. When bidder may purchase.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in an action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Superior court had no authority to partition marital property pursuant to the provisions of this section where the jurisdiction of the district court had been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Dismissal of Appeal Held Error. — Where petitioners excepted to the commissioners' report under § 46-19, the trial court did not have the authority to dismiss the appeal due to petitioners failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

Cited in McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993).

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

CASE NOTES

I. In General.

I. IN GENERAL.

Jurisdiction of Superior Court. — Where petitioner tried but failed to invoke the jurisdiction of the district court for equitable distribution of the parties' marital property the superior court had subject matter jurisdiction to hear the proceeding for the partition of the subject property. Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873, cert. denied, 338 N.C. 515, 452 S.E.2d 809 (1994).

§ 46-7. Commissioners appointed.

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-10. Commissioners to meet and make partition; equalizing shares.

The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C.S., s. 3222; 1995, c. 379, s. 14(b).)

Effect of Amendments. — The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, deleted "or any constable" following "sheriff".

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

Petitioners Not Required to State Specific Grounds. — Where petitioners excepted to the commissioners' report under this section, the trial court did not have the authority to dismiss the appeal due to petitioners' failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Failure of Court to Make Required Findings. — Where the trial court failed to make the findings of fact required by this section for partition by sale, that actual partition would result in one cotenant's share having less value than the share he would receive were the property partitioned by sale, and that actual partition would materially impair a cotenant's rights, since there was also no evidence in the record which would support such findings, the trial court's order of partition by sale was reversed. Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993).

Cited in Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7.)

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

(2) In the case of any party to the partition proceeding:
  a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or
  b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or
  c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and

(2) The purchaser has not agreed in writing to assume the lien; and

(3) The lien will not be satisfied out of the proceeds of the sale; and

(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale pursuant to the provisions of G.S. 1-339.27. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7.)

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.
47-3. [Repealed.]
47-7, 47-8. [Repealed.]
47-8.1. Certain documents verified by attorneys validated.
47-15. [Repealed.]

Article 2.

Registration.

47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.
47-18.1. Registration of certificate of corporate merger or consolidation.
47-18.2. Registration of Inheritance and Estate Tax Waiver.
47-18.3. Execution of corporate instruments; authority and proof.
47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.
47-29.1. Recordation of waste disposal on land.
47-30. Plats and subdivisions; mapping requirements.
47-31. Certified copies may be registered; used as evidence.
47-32. Photographic copies of plats, etc.
47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.
47-36.1. Correction of errors in recorded instruments.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

47-41. [Repealed.]
47-41.01. Corporate conveyances.
47-41.02. Other forms of probate for corporate conveyances.
47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.
47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.
47-46.3. Affidavit of lost note.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

Sec.
47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.
47-50. Order of registration omitted.
47-51. Official deeds omitting seals.
47-53. Probates omitting official seals, etc.
47-53.1. Acknowledgment omitting seal of notary public.
47-54.1. Registration by register's assistants or deputies.
47-71.1. Corporate seal omitted prior to January 1, 1991.
47-100. Acknowledgments taken by officer who was grantor.
47-108.5. Validation of certain deeds executed in other states where seal omitted.
47-108.11. Validation of recorded instruments where seals have been omitted.
47-108.20. Validation of certain recorded instruments that were not acknowledged.
47-108.21. Sales for 1930 on dates other than first Monday in June validated.
47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.
47-108.23. Tax sales for 1933-34 and certificates validated.
47-108.24. Notices of sale for taxes by publication validated.
47-108.25. Validation of sales and resales held pursuant to § 105-374.
47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

47-112. Forgery or alteration of discharge or certificate; punishment.

Article 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

Sec.
47-115.1. [Repealed.]

ARTICLE 1.

Probate.

§ 47-3: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-7: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-8: Repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-8.1. Certain documents verified by attorneys validated.

Final judgments otherwise proper, entered in actions or proceedings in which the complaints or any other documents were verified in violation of G.S. 47-8 prior to its repeal shall not be void or voidable. (1991, c. 543, s. 2.)

Editor's Note. — Session Laws 1991, c. 543, s. 4 made this section effective upon ratification. This section was ratified July 4, 1991.

Section 47-8 referred to in this section, was repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-14.1. Repeal of laws requiring private examination of married women.

CASE NOTES

Cited in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Article 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Local Modification. — (As to Article 2) Mitchell: 1987, c. 537.

§ 47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.

It shall not be necessary in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, to record a written assignment in the office of the register of deeds in the county in which the real property is located. A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. The provisions of this section do not preclude the recordation of a written assignment of a deed of trust, mortgage, or other security instrument, with or without the promissory note or other instrument that it secures, provided that the assignment complies with applicable law. (1993, c. 288, s. 4.)

Editor's Note. — Session Laws 1993, c. 288, s. 4, made this section effective upon ratification. The act was ratified July 6, 1993, and applies to assignments made on or after that date.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

Legal Periodicals. —

For article, "Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases," see 14 Campbell L. Rev. 275 (1993).

For essay, "Russell v. Hill (N.C. 1899) Misunderstood Lessons," see 73 N.C.L. Rev. 2031 (1995).

CASE NOTES

I. In General.
III. What Instruments Affected.
IV. Persons Protected and Rights Thereof.
V. Notice.

I. IN GENERAL.

This section and § 47-20, etc. — The recording statute for deeds of trust, § 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

This section and § 47-20 are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Transformation Into Pure Race State. — The Connor Act of 1885, currently codified as this section, transformed North Carolina into a "pure race" state for the recording of deeds, contracts to convey, and other instruments affecting interests in land; under its terms, no such instrument is effective as against either lien creditors, or purchasers for value, until the time of its registration. Love v. United States, 889 F. Supp. 1548 (E.D.N.C. 1994).

The purpose of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Title Examiner Must Read Prior Conveyances. — In title examination when checking the grantor's out conveyances, it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Principles applicable to sufficiency of references, etc. — In accord with the main volume. See Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Rents Already Accrued and Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Applied in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 79 N.C. App. 187, 339 S.E.2d 26 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990); In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

III. WHAT INSTRUMENTS AFFECTED.

Parol and Implied Trusts, etc. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

IV. PERSONS PROTECTED AND RIGHTS THEREOF.

State's Title Superior Where Intervenor's Interest Derived from Deed Recorded After Filing of Lis Pendens. — Since the State's title to property derived from a Racketeer Influenced and Corrupt Organizations Act forfeiture proceeding related back to the date of the institution of the action when the notice of lis pendens was filed pursuant to § 75D-5, the State's title was superior to the interest of an intervenor which derived from a deed from her husband recorded after the institution of the RICO action, and after the filing of the notice of lis pendens. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Creditors Put Upon Same Plane as Purchasers. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

V. NOTICE.

A purchaser has constructive notice of all duly recorded documents that a proper examination of the title should reveal. Stegall v. Robinson, 81 N.C. App 617, 344 S.E.2d 803 (1986).

Actual Knowledge Not Sufficient Notice of Restrictive Covenant. — It is well settled in the state that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title. Unlike in many states, actual knowledge, no matter how full and formal, is not sufficient to bind a purchaser in the state with notice of the existence of a restrictive covenant. Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 177 (1992).

Notice of Restrictive Covenants Recorded with First Conveyance of Subdivision Lots. — Defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat, but were recorded with the first conveyance out of lots in the subdivision. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

§ 47-18.1. Registration of certificate of corporate merger or consolidation.

(a) If title to real property in this State is transferred by operation of law upon the merger or consolidation of two or more corporations, such transfer is effective against lien creditors or purchasers for a valuable consideration from the corporation formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger or consolidation, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification. If the corporation involved is not a domestic corporation, a similar certificate by any competent authority in the jurisdiction of incorporation may be registered in accordance with this section.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the corporation formerly owning the property shall appear in the "Grantor" index, and the name of the corporation owning the property by virtue of the merger or consolidation shall appear in the "Grantee" index. (1967, c. 950, s. 3; 1991, c. 645, s. 2(b).)

§ 47-18.2. Registration of Inheritance and Estate Tax Waiver.

An Inheritance and Estate Tax Waiver or other consent to transfer issued by the Secretary of Revenue bearing the signature of the Secretary of Revenue or the official facsimile signature of the Secretary of Revenue may be registered by the Register of Deeds in the county or counties where the real estate described in the Inheritance and Estate Tax Waiver or consent to transfer is located in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by an officer shall be required. The name of the decedent owning the real property at death shall appear in the "Grantor" index. Nothing herein shall require a personal representative or other person interested in the decedent's estate to register Inheritance and Estate Tax Waivers or consents to transfer. (1987, c. 548, s. 3.)

Editor's Note. — Session Laws 1987, c. 548, s. 4 made this section effective upon ratification. The act was ratified July 3, 1987.

§ 47-18.3. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the bylaws or articles of incorporation, when it appears on the face of an instrument registered in the office of the register of deeds that the instrument was signed in the ordinary course of business on behalf of a domestic or foreign corporation by its chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, and attested or countersigned by another person who is its secretary or an assistant secretary, (or, in the case of a bank, its secretary, assistant secretary, cashier, or assistant cashier), such an instrument shall be as valid with respect to the rights of innocent third parties as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The subsection shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation.

(b) Any instrument registered in the office of the register of deeds, appearing on its face to be executed by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, is prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that the instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, and that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(c) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, inherent or apparent authority, ratification, estoppel, or otherwise.

(d) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(e) The Home Owners Loan Corporation or any corporation, the majority of whose stock is owned by the United States government, may convey lands or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution, under seal, of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1991, c. 647, s. 2.)

Editor's Note. — Session Laws 1991, c. 647, which enacted this section, in section 7 provides: "Sections 1 and 2 of this act are effective July 1, 1990, but shall not apply in any action or proceeding filed on or after July 1, 1990, and before the ratification of this act." The act was ratified on July 12, 1991.

§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section.

(b) For purposes of this section and G.S. 47-20.1, the following definitions apply:

(1) "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-109(3), timber, the proceeds from the sale of farm products or timber, or the proceeds from the recovery or

severance of any mineral deposits located on or under real property.

(2) "Assignment of leases, rents, issues, or profits" means every document assigning, transferring, pledging, mortgaging, or conveying an interest in leases, licenses to real property, and rents, issues, or profits arising from real property, whether set forth in a separate instrument or contained in a mortgage, deed of trust, conditional sales contract, or other deed or instrument of conveyance.

(3) "Collateral assignment" means any assignment of leases, rents, issues, or profits made and delivered in connection with the grant of any mortgage, or the execution of any conditional sales contract or deed of trust or in connection with any extension of credit made against the security of any interest in real property, where the assignor retains the right to collect or to apply such lease revenues, rents, issues, or profits after assignment and prior to default.

(c) The recording of a written document in accordance with G.S. 47-20.1 containing an assignment of leases, rents, issues, or profits arising from real property shall be valid and enforceable from the time of recording to pass the interest granted, pledged, assigned, or transferred as against the assignor, and shall be perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor.

(d) Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, deed of trust, conditional sales contract, or evidence of indebtedness which such assignment secures, the assignee shall thereafter be entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee shall be entitled to notify the tenant or other obligor to make payment to him and shall also be entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

(e) This section shall not exclude other methods of creating, perfecting, collecting, sequestering, or enforcing a security interest in rents, issues, or profits provided by the law of this State. (1829, c. 20; R.C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C.S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5; 1991, c. 234, s. 1.)

Editor's Note. — Session Laws 1991, c. 234, s. 1, amended this section effective October 1, 1991, and applicable to all assignments of leases, rents, issues, or profits, including collateral assignments, whether recorded prior to or after October 1, 1991.

CASE NOTES

I. In General.
II. Registration as Between Parties.
III. Persons Protected.
IV. Notice.

I. IN GENERAL.

The object of this section, etc. —

The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

The purpose of this section is to prevent fraud, and liens registered under this Article are still subject to the common law of North Carolina for determination of their validity. The statute merely adds an additional requirement that a mortgagee must meet before successfully asserting an interest in rents and profits of a mortgaged property against third parties. It is designed to protect third parties. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

Section Intended Primarily to Protect, etc. —

The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

This section is merely a recording statute that serves to protect third parties by giving record notice of a purported interest. Recordation does not serve to add to the substantive rights of a purported lien holder. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

No distinction is made, etc. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Construction of This Section and § 47-18, etc. —

This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, § 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Anyone at any time can register papers in compliance with this section, but such recordation does not create a perfected security interest. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

Recordation Necessary to Perfect Security Interest in Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Applied in In re Blanks, 64 Bankr. 467 (Bankr. E.D.N.C. 1986).

Cited in In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990).

II. REGISTRATION AS BETWEEN PARTIES.

Defendant was not a "party" to deed of trust for purposes of the rule that as between parties the instrument first executed, rather than the one first registered, has lien priority, where she signed the instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Inapplicability of Registration Statutes to Parol and Constructive Trusts. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

III. PERSONS PROTECTED.

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

IV. NOTICE.

Sections Not Mere Notice Statutes for Protection of Third Parties. — Section 47-18 and this section are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

No Mere Notice, etc. —
In accord with the main volume. See Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The "witness" exception to the recordation requirement is not applicable in this jurisdiction. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Cited in Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.2. Place of registration; personal property.

Legal Periodicals. —
For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-26. Deeds of gift.

CASE NOTES

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Cited in Hayes v. Turner, 98 N.C. App. 451, 391 S.E.2d 513 (1990).

§ 47-27. Deeds of easements.

CASE NOTES

Applicability to Board of Transportation. — In accord with second paragraph in the main volume. DOT v. Auten, 106 N.C. App. 489, 417 S.E.2d 299 (1992).

Applicability to Department of Transportation. — This section, which governs deeds for rights-of-way and easements, provides that the Department of Transportation does not have to record such interests in land which were acquired prior to July 1, 1959. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

Where a property interest spans more than one county, it is only effective against other claimants in the counties in which it has been recorded. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Race to the Courthouse. — As North Carolina is a pure race jurisdiction, where defendants failed to register their grant of easement in Person County before plaintiffs registered their deed there, plaintiffs won the "race to the courthouse," and their interest superseded the later-recorded interest claimed by defendants. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Purchaser for Value. — North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser." A "purchaser for value" or a "purchaser for valuable consideration" is simply defined as one who has paid a valuable consideration for the execution of an instrument of conveyance. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

§ 47-29.1. Recordation of waste disposal on land.

(a) **(See editor's note)** A permit for the disposal of waste on land shall be recorded as provided in G.S. 130A-301. The disposal of demolition debris in an on-site landfill having a disposal area of one acre or less shall be recorded as provided in G.S. 130A-301.2.

(b) An inactive hazardous substance or waste disposal site shall be recorded as provided in G.S. 130A-310.8. (1995, c. 502, s. 2.1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 502, s. 2.1 having been § 47-28.

Session Laws 1995, c. 502, which enacted this section effective July 28, 1995, in s. 4 provides that the second sentence of subsection (a) expires June 30, 2001.

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;
(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or
(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat" and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use.

(c) Information Contained in Title of Plat. — The title of each plat shall contain the following information: property designation, name of owner (the name of owner shall be shown for indexing purposes only and is not to be construed as title certification), location to include township, county and state, the date or dates the survey was made; scale or scale ratio in words or figures and bar graph; name and address of surveyor or firm preparing the plat.

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision such survey or such plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the registered land surveyor preparing the plat. All plats to be recorded shall be probated as required by law for the registration of deeds. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, ..., certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book ...., page ...., etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book ...., page ....; that the ratio of precision as calculated is 1: ....; that this plat was prepared in accordance with G.S. 47-30 as amended. Witness my original signature, registration number and seal this ...... day of ...., A.D., 19.....

....

Seal or Stamp

Surveyor

....

Registration Number"

The certificate of the Notary shall read as follows:

"North Carolina, ... County.

I, a Notary Public of the County and State aforesaid, certify that ...., a registered land surveyor, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this ...... day of ......, 19.....

....

Seal or Stamp

Notary Public

My Commission expires ...."

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of such inaccessible areas when such areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) such index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid

factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where such monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of said monument are on file in the North Carolina Department of Environment, Health, and Natural Resources, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27," indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, exist-

ing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in such portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. That the survey is of an existing parcel or parcels of land;

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of his or her professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — For purposes of recording, the register of deeds shall not be responsible for:

(1) The provisions of subsection (b), as to archival;

(2) The provisions of subsection (d), except for the notary certificate;

(3) The provisions of subsection (e); or

(4) The provisions of subdivisions (2) through (9) of subsection (f).

A plat, when proven and probated as provided herein for deeds and other conveyances, when presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina. Where local law is in conflict with this section, the provisions in this section shall apply. Failure of a plat to conform in all requirements of this statute shall be sufficient grounds for the register of deeds to refuse to accept the plat for recordation.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136.

(m) Except as provided in subsection (n), any map submitted for inclusion on the public record, whether submitted alone or attached to a deed or other instrument, shall be prepared by a registered land surveyor. Such a map shall either (i) have an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors or (ii) be a copy of a map, already on file in the public record, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for inclusion in the public record only for illustrative purposes and only if the map is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND NO RELIANCE MAY BE PLACED IN ITS ACCURACY." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2.)

Editor's Note. —

Session Laws 1987, c. 747, s. 25 provides that as used in c. 747, which amended subdivision (*l*), the word "municipality" means a "city" as defined by § 160A-1.

Session Laws 1987, c. 747, s. 26 is a severability clause.

Session Laws 1991 (Reg. Sess., 1992), c. 1030, s. 51.16 provides: "The General Statutes Commission will study the requirements of G.S. 47-30(m) and G.S. 89C-26 to determine whether it is possible to provide for a photographic copy of a map to be attached to a deed or other instrument without requiring an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors, while still protecting the public and assuring that maps have not been altered prior to submission for recording. The General Statutes Commission shall report its findings and recommendations to the 1993 General Assembly and shall submit its report not later than January 31, 1993 to the President Pro Tempore of the Senate and the Speaker of the House of Representatives."

OPINIONS OF ATTORNEY GENERAL

This section applies only to those maps or plats presented to the Register of Deeds for recording in his office. Whether or not the plat or map should be made to comply with this section and recorded depends on the purpose for which it is to be used. See opinion of Attorney General to Mr. Joe B. Freeman, Register of Deeds, Robeson County, 59 N.C.A.G. 1 (1989).

§ 47-31. Certified copies may be registered; used as evidence.

(a) A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county without further certification pursuant to G.S. 47-14; and the registered or duly certified copy of any deed or writing that has been registered in the county where the land is situate may be given in evidence in any court of the State.

(b) Instruments registered pursuant to this section prior to July 6, 1993 that were not further certified pursuant to G.S. 47-14 at the time of registration are hereby validated. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319; 1993, c. 288, ss. 2, 3.)

Editor's Note. — This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1993, c. 288, s. 3, amended this section effective July 6, 1993, and applicable to assignments made on or after that date, by adding present subsection (b).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

§ 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a Class 3 misdemeanor and upon conviction shall be subject only to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2; 1993, c. 539, s. 408; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 539, s. 408 amended this section effective October 1, 1994, and applicable to offenses occurring on or after that date, by inserting "Class 3" preceding "misdemeanor" and inserting "only" following "shall be subject" in the first paragraph.

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

Session Laws 1987, c. 360, s. 1 amended this section effective June 12, 1987, and applicable to corrections made on or after that date, by inserting the present third sentence.

CASE NOTES

Quoted in Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.

Local Modification. — Martin County: 1987 (Reg. Sess., 1988), c. 925.

§ 47-38. Acknowledgment by grantor.

CASE NOTES

Acknowledgment in Compliance with Section. — An acknowledgment to a will, upon which the name and title of the official taking the acknowledgment and the name of the maker as well as the witness was provided, their personal appearance was ascribed by the phrase "sworn to ... before me", the date and year of the acknowledgment were provided, the notary's signature and her seal were affixed thereto, and the phrase "sworn to and subscribed before me" appeared prominently below the signatures of the maker and witness, substantially conformed to the statutory provisions of this section. In re Hess, 104 N.C. App. 75, 407 S.E.2d 594 (1991).

§ 47-41: Repealed by Session Laws 1991, c. 647, s. 3, effective October 1, 1991.

Cross References. — As to corporate conveyances, see now §§ 47-41.01, 47-41.02.

Editor's Note. — Session Laws, 1991, c. 647, s. 3, which repealed this section, provides: "The provision of G.S. 47-41 shall continue to apply to all instruments executed before the effective date [October 1, 1991] of this section of this act."

§ 47-41.01. Corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the deed or other instrument is executed by the corporation's chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer signing the name of such corporation by him as such officer, is sealed with its common or corporate seal, and is attested by another person who is its secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or, in case of a bank, its secretary, assistant secretary, cashier or assistant cashier, the following form of acknowledgment is sufficient:

....

(State and county, or other
description of place where
acknowledgment is taken)

I, ..., ...,
(Name of officer taking (Official title of officer
acknowledgment) taking acknowledgment)
certify that .... personally came before
(Name of secretary, assistant secretary,
trust officer, assistant trust officer,
cashier or assistant cashier)
me this day and acknowledged that he (or she) is ....
(Secretary, assistant
secretary, trust officer,
assistant trust officer,
cashier or assistant
cashier)
of ...., a corporation, and that by authority duly
(Name of corporation)
given and as the act of the corporation, the foregoing instrument
was signed in its name by its ....,
(Chairman, president, chief executive
officer, vice-president, assistant vice-
president, treasurer, or chief finan-
cial officer)
sealed with its corporate seal, and attested by himself (or herself) as
its ....
(Secretary, assistant secretary,
trust officer, assistant trust officer,
cashier or assistant cashier)
Witness my hand and official seal, this the .... day of
............,
(Month)
....
(Year)
....
(Signature of officer taking acknowledgment)
(Official seal, if officer taking
acknowledgment has one)
My commission expires ....
(Date of expiration of commission as
notary public)

(1) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(2) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment. The fact that these words and this date may be located in a position on the form different from the position indicated in this subsection does not by itself invalidate the form.

(3) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk, or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered. (1991, c. 647, s. 4; 1995 (Reg. Sess., 1996), c. 742, s. 18.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7, made this section effective October 1, 1991.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, transferred "My commission expires ...." and "(Date of expiration of commission as notary public)" from below "(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)" to below "(Official seal, if officer taking acknowledgment has one)" in the acknowledgment form in subsection (b); and added the last sentence of subdivision (b)(2).

§ 47-41.02. Other forms of probate for corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall also be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This ...... day of .... A.D. ...., personally came before me (here give the name and official title of the officer who signs this certificate) A.B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C.D., who is the president (or presiding member or trustee), and also with E.F. and G.H., two other members of said corporation; and that he, the said A.B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this ...... day of .... (year).

(Official seal.)

....

(Signature of officer.)

(c) If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ... County.

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of the officer who signs the certificate) A.B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C.D., who is the president of said corporation, and that he, the said A.B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A.B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A.B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the .... day of ...... (year).

(Official seal.)

....
(Signature of officer.)

North Carolina, ... County.

This is to certify that on the ...... day of ......, 19...., before me personally came .... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ...... is the president (or vice-president), and ...... is the secretary (or assistant secretary) of the ......, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ...... day of ...... (year).

(Official seal.)

....
(Signature of officer.)

(d) If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of officer who signs the certificate) A.B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the ...... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A.B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

....
(Signature of officer.)

(e) All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

(f) The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust, and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina
.... County
I, ..., do hereby certify that ....
(Name of president, secretary or treasurer)
personally came before me this day and acknowledged that he is
.... of .... and acknowledged,
(President, secretary or treasurer) (Name of corporation)
on behalf of ...., the grantor, the due
(Name of corporation)
execution of the foregoing instrument.
Witness my hand and official seal, this ..... day of ....., 19.....
(Official seal)
....
(Title of officer)

....
(Name of state)
....
(County)
I, ...
(Name of officer taking proof) (Official title of officer taking proof)
of ...., certify that
(County) (Name of state)
.... personally appeared before
(Name of subscribing witness)
me, and being duly sworn, stated that in his presence
....
(Name of president, secretary or treasurer of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)
Witness my hand and official seal, this .... day of
.................., 19.........
(Month) (Year)
....
(Signature of official taking proof)
....
(Official title of official taking proof)
My commission expires ....
(Date of expiration of official's commission)

(g) All deeds and other conveyances executed on or before April 12, 1974, by the president, any vice-president, assistant vice-president, manager, comptroller, treasurer, assistant treasurer, trust officer or assistant trust officer, or chairman or vice-chairman of a corporation are hereby validated to the extent that such deeds or other conveyances were otherwise properly executed, probated, and recorded. (1991, c. 647, s. 5; 1991 (Reg. Sess., 1992), c. 1030, s. 14.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7 made this section effective October 1, 1991.

§ 47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

The form of a notice of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(5) shall be substantially as follows:

North Carolina, ... County.

I, ... (name of trustee or mortgagee), certify that the debt or other obligation in the amount of .... secured by the (deed of trust) (mortgage) (other instrument) executed by .... (grantor) (mortgagor), ... (trustee) (leave blank if mortgage), and .... (beneficiary) (mortgagee), and recorded in .... County at .... (book and page) was satisfied on .... (date of satisfaction).

....

(Signature of trustee or mortgagee)

I, ... (name of officer taking acknowledgment), ... (official title of person taking acknowledgment) certify that .... (name of trustee or mortgagee) personally came before me this day and acknowledged the satisfaction of the provisions of the above-referenced (deed of trust) (mortgage) (other instrument).

Witness my hand and official seal this the .... day of .... (month), ... (year).

....

.(Signature of officer taking acknowledgment)

My commission expires .... (Date of expiration of official's commission).

North Carolina, ... County.

The foregoing acknowledgment of .... (name of officer that took acknowledgment), ... (official title of person that took acknowledgment), is certified to be correct.

This .... (day) of .... (month), ... (year).

....

(Signature of Register of Deeds).

(1987, c. 405, s. 2; c. 662, s. 4; 1989, c. 434, s. 2.)

Editor's Note. — Session Laws 1987, c. 405, s. 3 made this section effective 30 days after ratification. The act was ratified June 18, 1987.

Session Laws 1989, c. 434, s. 2, amended this section effective retroactively to July 18, 1987 and applicable to all applications for notice of satisfaction of a deed of trust, mortgage, or other instrument made on or after that date.

§ 47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.

The form of a certificate of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(6) shall be substantially as follows:

CERTIFICATE OF SATISFACTION

North Carolina, ____________________ County.

I, ______________ (name of owner of the note or other indebtedness secured by the deed of trust or mortgage), certify that I am the owner of the indebtedness secured by the hereafter described deed of trust or mortgage and that the debt or other obligation in the amount of ______________ secured by the (deed of trust) (mortgage) (other instrument) executed by ____________________ (grantor) (mortgagor), ____________________ (trustee) (leave blank if mortgage), and ____________________ (beneficiary) (mortgagee), and recorded in ____________________ County at ____________________ (book and page) was satisfied on ____________________ (date of satisfaction). I request that this certificate of satisfaction be recorded and the above-referenced security instrument be canceled of record.

____
(Signature of owner of note)

[Acknowledgment before officer authorized to take acknowledgments]. (1995, c. 292, s. 3.)

Editor's Note. — Session Laws 1995, c. 292, s. 7, made this section effective October 1, 1995.

§ 47-46.3. Affidavit of lost note.

The form of an affidavit of lost note, if required pursuant to G.S. 45-37(a)(6), shall be substantially as follows:

AFFIDAVIT OF LOST NOTE

[Name of affiant] personally appeared before me in ____________________ County, State of ______________, and having been duly sworn (or affirmed) made the following affidavit:

1. The affiant is the owner of the note or other indebtedness secured by the deed of trust, mortgage, or other instrument executed by ____________________ (grantor, mortgagor), ____________________ (trustee), and ____________________ (beneficiary, mortgagee), and recorded in ____________________ County at ____________________ (book and page); and
2. The note or other indebtedness has been lost and after the exercise of due diligence cannot be located.
3. The affiant certifies that all indebtedness secured by the deed of trust, mortgage, or other instrument was satisfied on ________________________________, 19 ______ (date of satisfaction), and the affiant is responsible for cancellation of the same.

____
(Signature of affiant)

Sworn to (or affirmed) and subscribed before me this ______________ day of ________________________, 19 ____.

[Signature and seal of notary public or other official authorized to administer oaths]. (1995, c. 292, s. 4; 1995 (Reg. Sess., 1996), c. 604, s. 2; c. 742, s. 19.)

Editor's Note. — Session Laws 1995, c. 292, s.7, made this section effective October 1, 1995.

This section was amended by Session Laws 1995 (Reg. Sess., 1996), c. 604, s. 2, and c. 742, s. 19, the amendments being similar. The section is set out above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 604, s. 2, effective June 21, 1996, substituted "was satisfied on ______________, 19 _____" for "has been satisfied" in subdivision 3 of the affidavit.

Session Laws 1995 (Reg. Sess., 1996), c. 742, s. 19, effective June 21, 1996, substituted "was satisfied on ______________ (date of satisfaction)" for "has been satisfied" in subdivision 3 of the affidavit.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to April 1, 1980. (1917, c. 237; C.S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11; 1973, c. 1402; 1987, c. 360, s. 2.)

Editor's Note. — Session Laws 1987, c. 360, s. 2, amended this section effective June 12, 1987, and applicable to corrections made on or after that date, by substituting "April 1, 1980" for "April 1, 1974" at the end of the section.

§ 47-50. Order of registration omitted.

In all cases prior to December 31, 1992, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C.S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79; 1981, c. 812; 1993, c. 80, s. 1.)

Editor's Note. — Session Laws 1993, c. 80, s. 2, provides that the act does not affect litigation pending on ratification (May 25, 1993).

§ 47-51. Official deeds omitting seals.

All deeds executed prior to January 1, 1991, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2; 1987, c. 277, s. 2; 1989, c. 390, s. 2; 1991, c. 489, s. 2.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January 1, 1991: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1;

1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3; 1987, c. 277, s. 3; 1989, c. 390, s. 3; 1991, c. 489, s. 3.)

Editor's Note. — Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-53.1. Acknowledgment omitting seal of notary public.

Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to January 1, 1991. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4; 1987, c. 277, s. 4; 1989, c. 390, s. 4; 1991, c. 489, s. 4.)

Editor's Note. — Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-54.1. Registration by register's assistants or deputies.

All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's assistant or deputy, and signed in the name of the register of deeds by the assistant or deputy, and initialed by the assistant or deputy, instead of being signed by them as assistant or deputy, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed by the assistant or deputy in the respective capacity. (1991 (Reg. Sess., 1992), c. 877, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 877, s. 2 made this section effective upon ratification. The act was ratified July 7, 1992.

§ 47-71.1. Corporate seal omitted prior to January 1, 1991.

Any corporate deed, or conveyance of land in this State, made prior to January 1, 1991, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5; 1987, c. 277, s. 5; 1989, c. 390, s. 5; 1991, c. 489, s. 5.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-100. Acknowledgments taken by officer who was grantor.

In all cases where a deed or deeds dated prior to the first day of January, 1980, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1980, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986; 1991 (Reg. Sess., 1992), c. 1030, s. 51.8.)

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to January 1, 1991, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6; 1987, c. 277, s. 6; 1989, c. 390, s. 6; 1991, c. 489, s. 6.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1995 or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7; 1987, c. 277, s. 7; 1989, c. 390, s. 7; 1991, c. 489, s. 7; 1995, c. 163, s. 16.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. — The 1995 amendment, effective June 5, 1995, substituted "January 1, 1995" for "January 1, 1991" in the last paragraph.

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

§ 47-108.21. Sales for 1930 on dates other than first Monday in June validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year of 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-387. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-388. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.23. Tax sales for 1933-34 and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-389. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.24. Notices of sale for taxes by publication validated.

All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-390. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.25. Validation of sales and resales held pursuant to § 105-374.

All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-391. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Sections 1-327 and 1-328, referred to in this section, were repealed by Session Laws 1949, c. 719, s. 2. Section 45-28, referred to in this section, was repealed by Session Laws 1949, c. 720, s. 5.

§ 47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-392. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-112. Forgery or alteration of discharge or certificate; punishment.

Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1921, c. 198, s. 4; C.S., s. 3366(n); 1993, c. 539, s. 409; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 409, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2, effective October 1, 1983.

Cross References. — As to powers of attorney, see now § 32A-1 et seq. As to effect of powers of attorney executed pursuant to § 47-115.1 prior to October 1, 1983, see § 32A-14.

Chapter 47A.

Unit Ownership.

Article 1.

Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

§ 47A-2. Declaration creating unit ownership; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-3. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

Developer as Unit Owner. — Neither the definition of "unit owner" nor the provisions of § 47A-12 make any distinction between a developer and any other unit owner; defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" and was bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common areas and facilities. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-4. Property subject to Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history

and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-5. Nature and incidents of unit ownership.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-6. Undivided interests in common areas and facilities; ratio fixed in declaration; conveyance with unit.

CASE NOTES

Cited in Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-8. Use of common areas and facilities.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Incorporated condominium homeowners' association lacked standing to sue in its own name to enforce various restrictions on activity at the condominiums. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

To receive preliminary injunction, plaintiff must show likelihood of success on merits and some type of irreparable harm. This standard, however, does not require showing that injury is beyond repair, but that injury is one to which complainant should not be required to submit or other party permitted to inflict. Wrightsville Winds Townhouses

Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Decision by trial court to issue or deny injunction will be upheld if there is ample competent evidence to support decision, even though evidence may be conflicting and appellate court could substitute its own findings. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

§ 47A-12. Unit owners to contribute to common expenses; distribution of common profits.

CASE NOTES

Purpose. — The provisions of this section are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas when other unit owners, including the developer, attempt to unilaterally exempt themselves from contributing their pro rata share of maintenance expenses. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Developer as Unit Owner. — Neither the definition of "unit owner" in § 47A-3 nor the provisions of this section make any distinction between a developer and any other unit owner; defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" and was bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common areas and facilities. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Developer Not Exempt. — The legislature did not intend to allow a developer, as a unit owner, to unilaterally exempt itself from the payment of its pro rata share of the maintenance expenses for the common areas. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986); Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-18. Bylaws; annexed to declaration; amendments.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-19. Bylaws; contents.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The bylaws must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-21. Units taxed separately.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-28. Persons subject to Article, declaration and bylaws; effect of decisions of association of unit owners.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

ARTICLE 2.

Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Chapter 47B.

Real Property Marketable Title Act.

Sec.
47B-3. Exceptions.

§ 47B-1. Declaration of policy and statement of purpose.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

In order to prove title to land under the Real Property Marketable Title Act, defendant had to establish: (1) that defendant, alone or together with his predecessors in title, was vested with an estate in real property which had been of record for at least thirty years; (2) the public record showed a title transaction at least thirty years old which purported to vest title in defendant or some other person from whom, by one or more title transactions, the property had passed to defendant; and (3) that nothing appeared of record to divest defendant of the estate. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Applied in Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986); Younce v. United States, 661 F. Supp. 482 (W.D.N.C. 1987); Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989).

Cited in Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992).

§ 47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracts. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for any one of the following purposes:

   a. Flowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist.

   b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

   c. Conserving land or water areas pursuant to a conservation agreement or preserving a structure or site pursuant to a preservation agreement under Article 4 of Chapter 121 of the General Statutes.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B. (1973, c. 255, s. 1; 1995, c. 443, s. 3.)

Effect of Amendments. — The 1995 amendment, effective July 18, 1995, in subdivision (8) substituted "any one of the following purposes" for "the purpose of" in the introductory language, deleted "or" at the end of subdivision (8)a., added subdivision (8)c., and made punctuation changes.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

Chapter 47C.

North Carolina Condominium Act.

Article 1.

General Provisions.

Sec.

47C-1-102. Applicability.

Article 2.

Creation, Alteration, and Termination of Condominiums.

Sec.

47C-2-109. Plats and plans.

ARTICLE 1.

General Provisions.

§ 47C-1-102. Applicability.

(a) This chapter applies to all condominiums created within this State after October 1, 1986. Sections 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-107A (Charges for Late Payment, Fines), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State on or before October 1, 1986; but those sections apply only with respect to events and circumstances occurring after October 1, 1986 and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

(b) The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (G.S. 47C-4-102 through 47C-4-108) apply to all contracts for the dispositions thereof signed in this State by any party unless exempt under G.S. 47C-4-101(b). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1995, c. 509, s. 135.1(h).)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "47C-3-107A (Charges for Late Payment, Fines)" in subsection (a); and inserted "on or" preceding "before October 1, 1986" in subsections (a) and (b).

§ 47C-1-103. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-105. Contents of declaration.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-109. Plats and plans.

(a) The declarant shall file with the register of deeds in each county where the condominium is located the condominium's plat or plan prepared in accordance with this section. The plat or plan shall be considered a part of the declaration but shall be recorded separately, and the declaration shall refer by number to the file where such plat or plan is recorded. Each plat or plan shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to be recorded, numbered serially in the order of receipt, and designated "Condominium" with the name of the building, if any, and shall contain a reference to the book and page numbers and date of the recording of the declaration. Each plat or plan must contain a certification by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes that it contains all of the information required by this section.

(b) Each plat or plan or combination thereof must show:

(1) The name and a survey or general schematic map of the entire condominium;

(2) The location and dimensions of all real estate not subject to development rights or subject only to the development right to withdraw and the location and dimensions of all existing improvements within that real estate;

(3) The location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) The extent of any encroachments by or upon any portion of the condominium;

(5) The location and dimensions of all easements having specific location and dimensions and serving or burdening any portion of the condominium;

(6) The verified statement of an architect licensed under the provisions of Chapter 83A of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes certifying that such plats or plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built;

(6a) The certificate by a registered land surveyor licensed under the provisions of Chapter 89C of the General Statutes stating that the plats or plans accurately depict the legal boundaries and the physical location of the units and other improvements relative to those boundaries;

(7) The locations and dimensions of limited common elements; however, parking spaces and the limited common elements described in subsections 47C-2-102(2) and (4) need not be shown, except for decks, stoops, porches, balconies, and patios;

(8) A legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) The distance between noncontiguous parcels of real estate comprising the condominium;

(10) Any unit in which the declarant has reserved the right to create additional units or common elements.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (c) or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(e) In order to be recorded, plats or plans filed shall:

(1) Be reproducible plats or plans on cloth, linen, film, or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings or suitable scale to assure legibility require, plats or plans may be placed on two or more sheets with appropriate match lines.

(f) The fee for recording each plat or plan sheet submitted shall be as prescribed by G.S. 161-10(a)(3). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1987, c. 282, s. 8; 1989, c. 571.)

Editor's Note. —

Session Laws 1989, c. 571, amended this section effective October 1, 1989 and applicable to all plats and plans filed with the register of deeds on or after that date, by adding subdivision (b)(6a).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-110. Exercise of development rights.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

ARTICLE 3.

Management of the Condominium.

§ 47C-3-102. Powers of unit owners' association.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Applicability of Fee Provision. — Fee provision in new Condominium Act was not made applicable to existing condominium associations. Miesch v. Ocean Dunes Homeowners Ass'n, 120 N.C. App. 559, 464 S.E.2d 64 (1995).

§ 47C-3-105. Termination of contracts and leases of declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-112. Conveyance or encumbrance of common elements.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-115. Assessments for common expense.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-116. Lien for assessments.

CASE NOTES

Fine for Each Day of Continued Violation. — Board of directors of homeowners association did not exceed its authority in levying a fine of $100 for each day plaintiff continued in violation of condominium rule, by altering the outside of her home. Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995).

§ 47C-3-117. Other liens affecting the condominium.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 4.

Protection of Purchasers.

§ 47C-4-110. Escrow of deposits.

CASE NOTES

Evidence Regarding Requirement. — Deposit money given to reserve a condominium unit under this section was still rightfully owned by the purchaser were required to be placed in escrow. It follows that it was not error for the trial judge to deny defendant's motion in limine to exclude evidence indicating such a requirement. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Testimony Regarding Absence of

Criminal Sanctions. — Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of this section is not subject to criminal sanctions. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

§ 47C-4-114. Implied warranties of quality.

Legal Periodicals. — For comment, "From Caveat Emptor to Consumer Equity — The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act," see 27 Wake Forest L. Rev. 571 (1992).

Chapter 48.

Adoptions.

Article 1.

General Provisions.

§ 48-1-100. Legislative findings and intent; construction of Chapter.

Editor's Note. — Session Laws 1995, c. 457, effective July 1, 1996, enacts a new Chapter 48 to replace former Chapter 48, derived from Session Laws 1949, c. 300, which it replaces.

Session Laws 1995, c. 457, s. 11, provides: "Nothing in this act shall affect the validity of an adoption completed or validated under any prior law."

Session Laws 1995, c. 457, s. 12, provides that this Article is effective July 1, 1996, and that any petition for adoption filed prior to and still pending on that date shall be completed in accordance with the law in effect immediately prior to that date.

Legal Periodicals. —

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

§ 48-1-106. Legal effect of decree of adoption.

CASE NOTES

I. In General.

I. IN GENERAL.

***Editor's Note.** — The opinions below were decided prior to the 1995 revision of Chapter 48.*

Adoption Terminates Rights of Natural Parents. —

A natural parent who has consented to the adoption of his or her children cannot thereafter bring an action against the natural parent and adoptive parent for custody or visitation of the children. Kelly v. Blackwell, 121 N.C. App. 621, 468 S.E.2d 400 (1996).

Article 2.

General Adoption Procedure.

Part 1. Jurisdiction and Venue.

§ 48-2-100. Jurisdiction.

CASE NOTES

***Editor's Note.** — The opinions below were decided prior to the 1995 revision of Chapter 48.*

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, — N.C. App. —, 454 S.E.2d 693 (1995).

Simultaneous Adoption and Custody Actions. — Because the legislature has enunciated a public policy that every child should have a permanent plan of care, thus because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

In the absence an order of consolidation when the same child is the subject of a simultaneous custody and adoption proceeding, both the superior and district courts do not have continuing jurisdiction to fully adjudicate the respective issues before them. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care for the child and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding, therefore, upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, — N.C. App. —, 454 S.E.2d 693 (1995).

§ 48-2-102. Transfer, stay, or dismissal.

Legal Periodicals. —

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

Article 10.

Prohibited Practices in Connection With Adoption.

§ 48-10-102. Unlawful payments related to adoption.

CASE NOTES

Editor's Note. — *The opinions below were decided prior to the 1995 revision of Chapter 48.*

Violation of Section. — Actions of adopting parents and their attorney in making funds available for the purpose of bringing a biological mother into the State so as to facilitate the adoption of her unborn child, including supporting her and the child through the date of birth and returning the mother to her home state, constituted a violation of this section. In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

Cancellation of Child Support Arrearages Against Public Policy. — Where the trial court concluded that mother was equitably estopped from collecting the child support arrearages and the sole basis for the estoppel was that the mother had promised she would "not pursue the action for child support arrears" in exchange for the father's consent to adoption, the agreement violated this section in that both the mother and the father gave and received consideration for the placement of the child for adoption. Thus the agreement was void as being contrary to the public policy and could not be used in equity to estop the mother from enforcing her judgment for the full amount of the child support arrearages. State ex rel. Raines v. Gilbert, 117 N.C. App. 129, 450 S.E.2d 1 (1994).

Chapter 48A.

Minors.

§ 48A-2. Age of minors.

CASE NOTES

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to § 50-13.7. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Stated in Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422 (1988).

Cited in Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990); Ballard v. Weast, 121 N.C. App. 391, 465 S.E.2d 565 (1996).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

Sec.
49-7. Issues and orders.
49-8. Power of court to modify orders, suspend sentence, etc.

Article 2.

Legitimation of Illegitimate Children.

49-12.1. Legitimation when mother married.

Article 3.

Civil Actions Regarding Illegitimate Children.

Sec.
49-14. Civil action to establish paternity.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Legal Periodicals. — For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

CASE NOTES

Cited in Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 414, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

I. In General.
V. Instructions, Submission to Jury, and Verdict.

I. IN GENERAL.

Effect of Prosecution upon Subsequent Civil Proceedings, etc. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Applied in Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

And Submission of Interrogatories or Issues, etc. — Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

Verdict Held Insufficient. — A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

§ 49-4. When prosecution may be commenced.

CASE NOTES

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. Bertie-Hertford Child Support Enforcement Agency ex rel. Souza v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

§ 49-7. Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the child, subject to the limitations of G.S. 50-13.10. The amount of child support shall be determined as provided in G.S. 50-13.4(c). The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1; 1989, c. 529, s. 6.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

§ 49-8. Power of court to modify orders, suspend sentence, etc.

Upon the determination of the issues set out in G.S. 49-7 and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require subject to the limitations of G.S. 50-13.10. The order or orders made in this regard may include any or all of the following alternatives:

(1) Repealed by Session Laws 1994, Extra Session, c. 14, s. 35, effective October 1, 1994.
(2) Suspend sentence and continue the case from term to term;
(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;
(4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;
(5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this Article. (1933, c. 228, s. 7; 1939, c. 217, s. 6; 1987, c. 739, s. 2; 1994, Ex. Sess., c. 14, s. 35.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 35, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

Cross References. — As to legitimation procedure when mother is married, see § 49-12.1.

Legal Periodicals. —

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

CASE NOTES

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure Within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority, pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Statute Inoperative After Death of Father. — Both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Petition to Be Filed by Father Only. — This statute unambiguously limits the person who may file a legitimation petition to the putative father of any child born out of wedlock; thus, the putative grandfather lacked standing to attempt legitimation. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with adoption petition in lieu of affidavit required by § 48-13, a subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to this section before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). See also § 49-12.1.

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by § 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as § 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). But see now § 49-12.1(c).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under § 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Cited in Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Action Under § 49-14 Prohibited When Child Is Legitimated. — If child is legitimated by virtue of this section, an action under § 49-14 cannot be maintained, as § 49-14 establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

DNA sampling results may be used to rebut the presumption that a child born to a married woman is her husband's child and to simultaneously offer evidence that a person was "born out of wedlock" within the meaning of this section. Batcheldor v. Boyd, 108 N.C. App. 275, 423 S.E.2d 810 (1992), cert. denied, 333 N.C. 254, 426 S.E.2d 700 (1993).

Applied in DOT v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985); Batcheldor v. Boyd, 119 N.C. App. 204, 458 S.E.2d 1 (1995).

§ 49-12.1. Legitimation when mother married.

(a) The putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child. The procedures shall be the same as those specified by G.S. 49-10, except that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. A guardian ad litem shall be appointed to represent the child if the child is a minor.

(b) The presumption of legitimacy can be overcome by clear and convincing evidence.

(c) The parties may waive a jury trial and enter a consent order with the approval of the clerk of superior court. The order entered by the clerk shall find the facts and declare the proper person the father of the child and may change the surname of the child.

(d) The effect of legitimation under this section shall be the same as provided by G.S. 49-11.

(e) A certified copy of the order of legitimation under this section shall be sent by the clerk of superior court under his official seal to the State Registrar of Vital Statistics who shall make a new birth certificate bearing the full name of the father of the child and, if ordered by the clerk, changing the surname of the child. (1991, c. 667, s. 2; 1991 (Reg. Sess., 1992), c. 1030, s. 15.)

Editor's Note. — Session Laws 1991, c. 667, s. 3 made this section effective October 1, 1991.

CASE NOTES

Marital Presumption Rebuttable. — In the context of a custody dispute between the mother and her husband or former spouse, concerning a child born during their lawful marriage, the marital presumption is rebuttable only upon a showing that another man has formally acknowledged paternity, or has been adjudicated to be the father of the child. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

§ 49-13. New birth certificate on legitimation.

Cross References. — As to new birth certificate, see also § 49-12.1.

CASE NOTES

Cited in Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) **(See editor's note)** No such action shall be commenced nor judgment entered after the death of the putative father, unless the action is commenced either:

(1) Prior to the death of the putative father;

(2) Within one year after the date of death of the putative father, if a proceeding for administration of the estate of the putative father has not been commenced within one year of his death; or

(3) Within the period specified in G.S. 28A-19-3(a) for presentation of claims against an estate, if a proceeding for administration of the estate of the putative father has been commenced within one year of his death.

Any judgment under this subsection establishing a decedent to be the father of a child shall be entered nunc pro tunc to the day preceding the date of death of the father.

(d) **(See editor's note)** If the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3; 1995, c. 424, ss. 1, 2.)

Editor's Note. — Session Laws 1993, c. 333, s. 3, amended this section effective October 1, 1993, and applicable to civil paternity actions filed on or after that date.

Session Laws 1995, c. 424, which amended subsections (c) and (d), in s. 3 provides that the 1995 amendments to this section are effective October 1, 1995, and are applicable to actions commenced on or after that date, but before October 1, 1998, without regard to the date of death of the putative father, and that the act expires October 1, 1998.

Effective October 1, 1998, subsection (c) will read: "No such action shall be commenced nor judgment entered after the death of the putative father."

Effective October 1, 1998, subsection (d) will read: "If the action to establish paternity is brought more than three years after birth of a child, paternity shall not be established in a contested case without evidence from a blood or genetic marker test."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, rewrote subsection (c), and added "or is brought after the death of the putative father" in subsection (d).

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Editor's Note. *— The cases annotated below were decided prior to the 1993 amendment to § 49-14, which, inter alia, changed the evidentiary standard from beyond a reasonable doubt to clear, cogent and convincing evidence.*

Purpose, etc. —

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

The legislative purpose underlying this section's paternity actions is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Statute Inoperative After Death of Father. — Both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Action Under This Section Prohibited When Child Is Legitimated. — If child is legitimated by virtue of § 49-12, an action under this section cannot be maintained, as this section establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Only Parent Who Has Custody of Child May Bring Action for Support. — Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of § 50-13.4, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Failure to Join Child Does Not Require Dismissal. — In a civil action to establish paternity of an alleged illegitimate child the failure to properly join that child does not justify dismissal of the action. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

If the legislature had intended to require the child to be joined as a necessary party in an action under § 49-14, then it would have specifically stated such, as it did in § 49-10. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

Effect of Criminal Proceedings, etc. —

General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

No Certified Copies of Birth Certificates Attached to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiffs' petition, court was without subject matter jurisdiction to adjudicate defendant's paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Claim of Being Tricked into Fathering Child Not Appropriate as Defense. — Argument of defendant in paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial responsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Standard of Proof. — Section 49-10, just as this section, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. Smith v. Price, 74 N.C. App. 413, 340 S.E.2d 408 (1986).

Testimony by Expert Concerning Paternity. — Although it may be proper for a qualified physician to testify concerning the result of a defendant's blood test and concerning the use and application of the paternity index, it is not proper to allow the expert to state his opinion concerning paternity, as such an opinion is of no assistance to the trier of fact. The jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under § 49-10 to have child legitimated. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

DNA or Gene Testing. — Trial court erred in ordering DNA or gene testing subsequent to an adjudication of paternity. State ex rel. Hill v. Manning, 110 N.C. App. 770, 431 S.E.2d 207 (1993).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. —

For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

CASE NOTES

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v.

Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Retroactive Child Support Awards Authorized. — Trial court was not precluded as a matter of law from awarding retroactive child support under this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in § 1-52(2). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under § 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Failure to Attach Certified Copies of Birth Certificates to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiff's petition, court was without subject matter jurisdiction to adjudicate defendants' paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Effect of Criminal Proceedings upon Proceedings to Establish Paternity. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Reimbursement by State upon Receipt of Test Results. — Conclusion that defendant was not child's father and that the State was obligated to reimburse defendant for the monies it illegally garnished from his pay arose as a matter of law from paternity test results, which plaintiff and the court accepted as binding when order was entered, and stating those conclusions and ending the case properly in compliance with the law was the court's duty. State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991).

Cited in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988).

§ 49-16. Parties to proceeding.

CASE NOTES

Quoted in Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

§ 49-17. Jurisdiction over nonresident or nonpresent persons.

CASE NOTES

Constitutionality. — This section satisfies the first prong of the test set out in Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977) by creating special jurisdiction under very limited circumstances; on its face, this statute is constitutionally sound and although the language in this section which refers to "minimum contacts" is misleading and confusing in the context of the Dillon requirements, the intent of the statute is not to abrogate the second prong of the Dillon test; rather, the statute simply creates special jurisdiction in certain situations. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Due Process Requirements Satisfied. — In paternity suit, where the trial court adequately inquired into the defendant's contacts with this State and so set those findings out in its order without objection of the defendant, the hearing which was held on defendant's motion to dismiss for lack of personal jurisdiction comported with all due process requirements. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

North Carolina courts have a legitimate interest in protecting our citizens under circumstances such as those enumerated in this section. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Chapter 49A.

Rights of Children.

Article 1.

Children Conceived by Artificial Insemination.

§ 49A-1. Status of child born as a result of artificial insemination.

Legal Periodicals. — For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Sec.
50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.
50-16.1. [Repealed.]
50-16.2. [Repealed.]
50-16.5. [Repealed.]

ARTICLE 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

I. In General.

I. IN GENERAL.

Stated in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-13.1. Action or proceeding for custody of minor child.

Legal Periodicals. — For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

CASE NOTES

Rights of Presumed Parents. — Where there was no evidence another man had either been adjudicated the father of the child or acknowledged paternity, the marital presumption, that plaintiff was the natural father of the child, had not been rebutted and plaintiff thus had standing under this section to seek visitation rights with the child. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

Grandparents' Rights When Family Intact. — Reading subsection (a) in conjunction with §§ 50-13.2(b1), 50-13.5(j), and 50-13.2A strongly suggests that the legislature did not intend "custody" and "visitation" to be interpreted as synonymous in the context of grandparents' rights. The three special statutes provide grandparents with the right to seek "visitation" only in certain clearly specified situations. Those situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Section 50-13.1(a) does not grant plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence. Such orders may include a designation of time and place for the exchange of children away from the abused party, the participation of a third party, or supervised visitation. If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court.

(d) If, within a reasonable time, one parent fails to consent to adoption pursuant to Chapter 48 of the General Statutes or parental rights have not been terminated, the consent of the other consenting parent shall not be effective in an action for custody of the child. (1957, c. 545; 1967, c. 1153, s. 2; 1977, c. 501, s. 2; 1979, c. 967; 1981, c. 735, ss. 1, 2; 1985, c. 575, s. 3; 1987, c. 541, s. 2; c. 776; 1995 (Reg. Sess., 1996), c. 591, s. 5.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, added the second sentence of subsection (a); and added the third, fourth, and fifth sentences of subsection (b).

Legal Periodicals. — For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

CASE NOTES

I. In General.
III. Right of Parents to Custody.
  A. As Against Third Persons.
IV. Visitation Rights.
VIII. Effect of Verdicts, Separation Agreements and Consent Judgments.

I. IN GENERAL.

Provisions in Custody Orders. — Provisions directing the parties to cooperate with one another and to refrain from conduct that will be detrimental to the child are commonly included in custody orders. Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995), appeal dismissed, 343 N.C. 128, 468 S.E.2d 795 (1996).

III. RIGHT OF PARENTS TO CUSTODY.

A. As Against Third Persons.

Reversal of Award to Third Party. — Where in an initial custody determination, the trial court conducted the "best interest and welfare" analysis, and based solely on that analysis, awarded custody of the minor child to defendant (friend of mother who had cared for child since birth) rather than the plaintiff/father, the child's natural parent, the award of custody on this basis was error and must be reversed. Lambert v. Riddick, 120 N.C. App. 480, 462 S.E.2d 835 (1995).

IV. VISITATION RIGHTS.

Grandparents May Not Be Awarded Visitation Rights When Custody Is Not in Issue. — This section and §§ 50-13.5 and 50-13.2A must be read in conjunction with § 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

VIII. EFFECT OF VERDICTS, SEPARATION AGREEMENTS AND CONSENT JUDGMENTS.

Trial court did not abuse its discretion in awarding joint custody to both parties. Church v. Church, 119 N.C. App. 436, 458 S.E.2d 732 (1995).

§ 50-13.2A. Action for visitation of an adopted grandchild.

CASE NOTES

Custody Must Be at Issue. — Sections 50-13.2, 50-13.5, and this section must be read in conjunction with § 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

§ 50-13.4. (For applicability see note) Action for support of minor child.

CASE NOTES

- I. In General.
- IV. Amount of Support.
  - A. In General.
- V. Termination of Obligation.
  - A. In General.
- IX. Remedies.
  - F. Retroactive Support and Reimbursement.
  - G. Contempt.

I. IN GENERAL.

Editor's Note. *— The case of Gilliard v. Kirk, 633 F. Supp. 1529 (W.D. N.C. 1986), annotated in the main volume under the catchline "Deeming of Support Payments for AFDC Purposes" was reversed by 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987).*

Public Policy. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

IV. AMOUNT OF SUPPORT.

A. In General.

Deviation From Guidelines. — According to the statute, the trial court has the discretion to deviate from the presumptive guidelines in only two situations: (1) when application does not meet or exceeds the reasonable needs of the child; or (2) when application would be unjust or inappropriate. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 120 N.C. App. 260, 461 S.E.2d 798 (1995).

When Ability to Pay Determined. — A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Finding Where Award Is Based on Capacity to Earn. —

A party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Gratuitous Contributions. — A gratuitous contribution from another party does not diminish the reasonable needs of the children nor does it reduce a parent's obligation for support. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 120 N.C. App. 260, 461 S.E.2d 798 (1995).

Contribution by Grandparents No Basis for Reduction. — Mother's child support obligation should not have been reduced when her parents contributed to the support of the minor children living with the father. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 120 N.C. App. 260, 461 S.E.2d 798 (1995).

As maternal grandparents were under no legal obligation to offer support to grandchildren, their contributions should not have been taken into consideration when determining whether to deviate from the guidelines. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 120 N.C. App. 260, 461 S.E.2d 798 (1995).

Education and Insurance Expenses. — Defendant's argument that provisions to pay for higher education and to provide life and health insurance were not in the nature of child support was not without merit. Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Change in Circumstances Not Shown. — Where the trial court found that defendant voluntarily quit his job, willfully and intentionally depressed his income, and failed to meet his burden of proof in showing a substantial change of circumstances, the court entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

V. TERMINATION OF OBLIGATION.

A. In General.

When Legal Obligation to Support, etc. —

In accord with second paragraph in the main volume. See Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422, aff'd, 323 N.C. 617, 374 S.E.2d 275 (1988).

IX. REMEDIES.

F. Retroactive Support and Reimbursement.

Measure of Liability, etc. —

In accord with the main volume. See Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

G. Contempt.

Willfulness Is Required, etc. —

In accord with the main volume. See Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess. 1994) N.C. Session Laws Ch. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.9, 50-13.11 and subsection (f) of this section. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.5. Procedure in actions for custody or support of minor children.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

I. In General.

I. IN GENERAL.

The legislature set different standards in actions for support and in actions for custody and support in enacting this section. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

This section does not require a determination that one spouse is a dependent spouse and the other a supporting spouse. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

Settlement Agreement May Provide for Recovery of Attorney's Fees. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Consideration of Estate. — Trial court, in ruling on a motion for attorney's fees in a child custody and support action, may determine that a party has sufficient means to defray the cost of the action without considering the estate of the other party. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

- I. In General.
- II. Modification, Generally.
- III. Change in Circumstances.
- V. Findings and Discretion of Trial Court.
- VII. Procedure.

I. IN GENERAL.

No Voluntary Dismissal of Final Order Permitted. — Under Rule 41(a) and existing case law, parties may not voluntarily dismiss a final custody and child support order. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

II. MODIFICATION, GENERALLY.

Statutory Compliance Required. — Since there is a statutory procedure for modifying a custody determination, a party seeking modification of a custody decree must comply with its provisions. Bivens v. Cottle (Westlake), 120 N.C. App. 467, 462 S.E.2d 829 (1995).

A court is without authority to sua sponte modify an existing support order. Royall v. Sawyer, 120 N.C. App. 880, 463 S.E.2d 578 (1995).

Since the ruling in Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994) that recognized the constitutionally — protected paramount right of parents to custody, the ruling has been interpreted to apply only to an initial custody determination, and not to motions for change of custody based on changed circumstances. Speaks v. Fanek, 122 N.C. App. 389, 470 S.E.2d 82 (1996).

Order May Not Be Vacated by Stipulation. — Where an order of the trial court awarding plaintiff permanent custody and obligating defendant to pay permanent child support was rendered, nothing in Rule 41 granted authority to the parties, without action by the trial court, to vacate by stipulation the order previously entered in the action. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

III. CHANGE IN CIRCUMSTANCES.

A change in circumstances must be shown, etc. —

There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified. Bivens v. Cottle (Westlake), 120 N.C. App. 467, 462 S.E.2d 829 (1995).

Change of Circumstances in Conclusion of Law. — A substantial change of circumstances is unequivocally a conclusion of law, meaning that a change has occurred among the parties, and that change has affected the welfare of the children involved. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

A finding of change in child-oriented expenses is not a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances. Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995).

Ability to Pay. —

A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Imposition of Earnings Capacity Rule. —

A party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Showing of Changed Circumstances Held Insufficient. — Where the trial court found that defendant voluntarily quit his job, willfully and intentionally depressed his income, and failed to meet his burden of proof in showing a substantial change of circumstances, the court entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Reduction of Custodial Parent's Income on Return to School. — Plaintiff who quit her job to attend college could claim a voluntary reduction in income as a change of circumstance. Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

Findings Held Insufficient. — Where the factors listed by the trial court as dispositive on the substantial change of circumstance requirement were oriented toward parental fitness, not adverse alterations of the children's welfare, and were bare observations of plaintiff's or defendant's actions, not examples of how those actions adversely impacted the children, the findings, without more, did not meet the standard required to show circumstances must be so changed that the welfare of the child would be adversely affected unless the custody provision was modified. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

VII. PROCEDURE.

Where the only issue before the trial court was the custody of plaintiff's and defendant's son and there was no motion to modify the child support, the trial court was without authority to issue an order modifying an earlier consent order setting child support. Royall v. Sawyer, 120 N.C. App. 880, 463 S.E.2d 578 (1995).

§ 50-13.9. Procedure to insure payment of child support.

OPINIONS OF ATTORNEY GENERAL

Child Support Enforcement Proceedings. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess. 1994) N.C. Session Laws Ch. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.4(f), this section and 50-13.11. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.11. Orders and agreements regarding medical support for minor children.

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess. 1994) N.C. Session Laws Ch. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.4(f), 50-13.9 and this section. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-16.1: (For continued applicability see editor's note) Repealed by Session Laws 1995, c. 319, s. 1, effective October 1, 1995.

Legal Periodicals. —

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.
IV. Dependent Spouse.

I. IN GENERAL.

Applied in Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Quoted in Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Cited in Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706 (1988); Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988); Rudisill v. Rudisill, 102 N.C. App. 280, 401 S.E.2d 818 (1991); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994), aff'd, 340 N.C. 97, 455 S.E.2d 156, reh'g denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

IV. DEPENDENT SPOUSE.

Construction With Other Sections. — Whether a spouse is substantially in need of maintenance and support as defined by § former 50-16.1(3) is determined by construing this statute in pari material with the terms of former § 50-16.5 which prescribed factors for the trial court to consider in determining the amount of alimony. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

For a spouse to be "actually substantially dependent", etc. —

In accord with second paragraph in the main volume. See Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The term "actually substantially dependent," as used in the first portion of the definition in subdivision (3), means that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation; thus to qualify as a dependent spouse under that portion of subdivision (3), the spouse seeking alimony must be actually without means for providing for his or her accustomed standard of living. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

And Even Spouse Who Is Not "Actually Substantially Dependent" May Be Substantially in Need. — Even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of subdivision (3) of this section if he or she is substantially in need of maintenance and support, the meaning of which is determined by construing this statute in pari materia with the terms of § 50-16.5. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The trial court must evaluate the parties' income and expenses measured by the standard of living of the family as a unit in order to determine if a spouse is "actually substantially dependent." Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Spouse Not Dependent. —

Where the uncontradicted evidence disclosed that the year before the parties separated, the plaintiff had an income of $18,339.97 and the defendant had an income of $20,475.11, and the year they separated, the plaintiff's income was $19,301.46 and the defendant's income was $24,447.26, and that during the last year that they lived together, they maintained separate bank accounts and divided household expenses, evidence did not support the ultimate finding that the plaintiff was substantially and materially dependent upon the defendant for her support and maintenance, and the trial court erred in awarding the plaintiff alimony. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Spouse Held Dependent. —

Where plaintiff's budget of $2800 per month was both reasonable and commensurate with the standard of living which the couple maintained prior to the date of the separation, plaintiff had no income producing assets, but earned a net income of $1353 per month, and defendant's gross income was nearly four times that of plaintiff, these findings supported trial court's determination that plaintiff was a dependent spouse and that defendant was a supporting spouse. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

§ 50-16.1A. (For applicability see editor's note) Definitions.

CASE NOTES

Quoted in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-16.2: (For continued applicability see editor's note) Repealed by Session Laws 1995, c. 319, s. 1, effective October 1, 1995.

Legal Periodicals. —

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For article, "Maintenance, Alimony, and the Rehabilitation of Family Care," see 71 N.C.L. Rev. 721 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

CASE NOTES

I. In General.
II. Adultery.
III. Abandonment.

I. IN GENERAL.

Lack of Grounds. — The plain and definite meaning of § 50-16.11 is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to § 50-15.2 exists, the trial court, in its discretion, may order recoupment of any alimony pendente lite paid by the supporting spouse. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Identification of Support Payments. — Whether support payments are in fact alimony does not depend on whether order refers to it as "alimony" but instead on whether support payments constitute "reciprocal consideration" for property settlement provision of order. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

Only Dependent Spouse Is Entitled to Alimony or Alimony Pendente Lite. — Only a dependent spouse is entitled to alimony in North Carolina. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

Post-Separation Failure to Provide Necessary Subsistence. — Absent a valid separation agreement waiving all alimony rights under § 50-16.6(b), post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. Brown v. Brown, 104 N.C. App. 547, 410 S.E.2d 223 (1991), cert. denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

Applied in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

Cited in Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

II. ADULTERY.

To determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Section Does Not Distinguish Between Pre-Separation and Post-Separation Adultery. — Until the State grants them an absolute divorce, a couple, though separated from each other, continues to be wife and husband; therefore, this section, which sets down the fault grounds for alimony, does not distinguish between pre-separation and post-separation adultery. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Sexual Intercourse with Third Party During Period of Separation Is Adultery. — Voluntary sexual intercourse by a spouse with a third party during the period of separation required by § 50-6 is adultery as contemplated by this section, and is a ground for alimony. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

III. ABANDONMENT.

Constructive abandonment may be shown by mental or physical cruelty or willful failure of the defaulting spouse to fulfill obligations of the marriage. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Proof of constructive abandonment may not be based on evidence of actions after the parties separated. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Findings of Trial Court Held Insufficient on Question of Abandonment. — The findings and conclusions of the trial court were held insufficient to resolve the question raised by the defendant as to whether the plaintiff did in fact abandon the defendant, either actually or constructively, and would therefore be vacated and remanded for more detailed findings and conclusions with respect to the defendant's claim for alimony. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

§ 50-16.4. (For applicability see note) Counsel fees in actions for alimony, postseparation support.

CASE NOTES

I. In General.

I. IN GENERAL.

Quoted in Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

§ 50-16.5: (For continued applicability see editor's note) Repealed by Session Laws 1995, c. 319, s. 1, effective October 1, 1995.

CASE NOTES

I. In General.
II. Basis of Award.

I. IN GENERAL.

Construction With Other Provisions. — Whether a spouse is substantially in need of maintenance and support as defined by former § 50-16.1(3) is determined by construing this statute in pari material with the terms of former § 50-16.5 which prescribed factors for the trial court to consider in determining the amount of alimony. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

Stated in Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

II. BASIS OF AWARD.

Custodial Spouse's Caregiving Obligations. — While North Carolina's alimony statute does not contain express language which specifically allows consideration of the custodial spouse's caregiving obligations to the minor children, this consideration is nonetheless consistent with the "'overriding principle'" of "'fairness'" which guides the determination of alimony, as well as the statutory provision contemplating regard of "other facts of the particular case." Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

§ 50-16.6. (For applicability see note) When alimony, postseparation support, counsel fees not payable.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-16.7. (For applicability see note) How alimony and postseparation support paid; enforcement of decree.

Legal Periodicals. —

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

§ 50-16.8. (For applicability see note) Procedure in actions for postseparation support.

CASE NOTES

I. In General.

I. IN GENERAL.

A party may seek permanent alimony upon filing for a divorce from bed and board. Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-16.9. (For applicability see note) Modification of order.

Legal Periodicals. —

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.

I. IN GENERAL.

Reconsideration of Alimony Improper in Modification Hearing. — It is not appropriate to reconsider, in a modification hearing, the dependent spouse's entitlement to alimony, as the entitlement issue was permanently adjudicated by the original order. Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

Upon a Showing of Changed Conditions. —

Although there is no requirement that the alimony be modified, upon a showing of changed circumstance, the trial court should consider, in its discretion, whether to modify the original decree of alimony. Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

§ 50-20. Distribution by court of marital property upon divorce.

Legal Periodicals. —

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. General Consideration.
II. Marital and Separate Property.
  A. In General.
  B. Marital Property Generally.
  E. Pension and Retirement Benefits.
III. Distribution of Property.
  B. Factors to Be Considered.

I. GENERAL CONSIDERATION.

Applied in Leighow v. Leighow, 120 N.C. App. 619, 463 S.E.2d 290 (1995).

Cited in Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996).

II. MARITAL AND SEPARATE PROPERTY.

A. In General.

Both legal and equitable interest in real and personal property are subject to distribution under this section. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996).

B. Marital Property Generally.

When a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996).

Property Subject to Bankruptcy Proceedings. — When a pending claim for equitable distribution concerns property whose status as marital is foreseeably a matter of some dispute, a former spouse cannot sit on her rights in bankruptcy, only to surface later and lay claim to that property after it had already been subjected to possible liquidation, attachment, or other manner of disposal. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

E. Pension and Retirement Benefits.

Interest in Military Pension Not Dischargeable in Bankruptcy. — Marital property interests in a debtor's military pension are not dischargeable in bankruptcy. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

III. DISTRIBUTION OF PROPERTY.

B. Factors to Be Considered.

Loan Eligibility of Spouse. — Defendant's VA loan eligibility did not constitute distributable property for purposes of equitable distribution. Jones v. Jones, 121 N.C. App. 523, 466 S.E.2d 342 (1996).

§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

CASE NOTES

Cited in Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996).

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

Evidence was insufficient to determine that it was in the child's best interest to have another state assume jurisdiction. Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995), appeal dismissed, 343 N.C. 128, 468 S.E.2d 795 (1996).

Cited in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989); Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

§ 50A-2. Definitions.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-3. Jurisdiction.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Where an Indiana order, which awarded custody of child living in Indiana to mother, contained no findings of fact that Indiana was child's home state, or had been her home state within six months before the action was commenced, or that it was in her best interests for Indiana to assume jurisdiction because she had significant connection with the state, a North Carolina trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders; the Indiana court had not assumed jurisdiction over the custody determination of the child in substantial conformity with this Act. Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

Exercise of Jurisdiction Upheld. —

Where the minor child resided in North Carolina for about one year after birth, North Carolina was the only state where the parties and the minor child lived as a family unit and, although there are a number of witnesses that reside in New Hampshire, there are numerous other witnesses who reside in North Carolina, district court's order that North Carolina was the most appropriate and convenient forum was appropriate. Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

Proper Determination of Home State. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Where children had lived in North Carolina continuously from March 1987 until March 1989 when custody action was filed except for the 10-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree and the plaintiff resided in North Carolina for the entire period, the trial court correctly determined that North Carolina was the home state, thereby meeting one of the bases of jurisdiction under this section. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Significant Connection. — Where children resided in North Carolina for all but ten months of the two-year period prior to this action and that plaintiff resided in North Carolina for the entire period, the children and plaintiff had a "significant connection" with North Carolina, and there was substantial evidence regarding the children's "present or future care, protection, training, and personal relationships" in North Carolina. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Applied in Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991).

Cited in In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-5. Service of notice.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-7. Inconvenient forum.

CASE NOTES

Forum Appropriate. — Where the trial court made 15 detailed findings of fact including findings that support was paid by the defendant in North Carolina, three of the four parties live in Wilmington, North Carolina, and the plaintiff was moving to Virginia allegedly to go to school, these findings were sufficient to show that North Carolina was a convenient forum for the continued exercise of jurisdiction. Wilson v. Wilson, 121 N.C. App. 292, 465 S.E.2d 44 (1996).

§ 50A-9. Information under oath to be submitted to the court.

CASE NOTES

This section requires that every party in a custody pleading must give information under oath regarding the children's present address, the places where they have lived within the last five years, and the names and present addresses of the persons with whom the children have lived during that period. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Proper Exercise of Jurisdiction Despite Noncompliance with Oath Requirements. — Court of appeals declined to accept plaintiff's argument that failure to comply fully with this section's oath requirements defeated the court's subject matter jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

Failure to Attempt Service. — Where there was no attempt to serve other parent with notice of a Tennessee temporary custody hearing and she in fact never received notice of the hearing, the Tennessee court did not act substantially in conformity with this Chapter, and the order made by the Tennessee court was jurisdictionally defective. Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

Georgia's version of the Uniform Child Custody Jurisdiction Act (UCCJA) conforms to North Carolina's version. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Proper Exercise of Jurisdiction and Modification of Custody Decree. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-15. Filing and enforcement of custody decree of another state.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

§ 50A-20. Assistance to courts of other states.

CASE NOTES

Court erred in authorizing law enforcement officers to pick up children who were residing with petitioner and deliver them to respondent in an effort to assist Georgia court in enforcing its custody order; while trial court could have resorted to traditional contempt proceedings, there was no statutory basis for invoking the participation of law enforcement officers in producing the children. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Chapter 50B.

Editor's Note. — The legislation and annotations affecting Chapter 50B have been included in a recently published replacement chapter.

Chapter 51.

Marriage.

Article 1.

General Provisions.

Sec.
51-1.2. Marriages between persons of the same gender not valid.
51-2. Capacity to marry.

Article 2.

Marriage Licenses.

51-7. Penalty for solemnizing without license.

Sec.
51-9 through 51-11. [Repealed.]
51-12. [Repealed.]
51-13. [Repealed.]
51-15. Obtaining license by false representation misdemeanor.
51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

CASE NOTES

Applied in State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990).

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

CASE NOTES

Where marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354, cert. denied, 313 N.C. 599, 332 S.E.2d 178 (1985).

§ 51-1.2. Marriages between persons of the same gender not valid.

Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina. (1995 (Reg. Sess., 1996), c. 588, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 588, s. 2, made this section effective upon ratification. The Act was ratified June 20, 1996.

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 56 of Chapter 7A or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(b) When an unmarried female who is more than 12 years old, but less than 18 years old, is pregnant or has given birth to a child and such unmarried female and the putative father of the child, either born or unborn, shall agree to marry, and consent in writing to such marriage, as set out in subsection (a), subdivisions (1), (2), (3) or (4) above, or by the director of social services of the county of residence of either party, is given on the part of the female, the register of deeds is authorized to issue to said parties a license to marry, and it shall be lawful for them to marry in accordance with the provisions of this Chapter.

(c) When a license to marry is procured by or on behalf of any person under 18 years of age by fraud or misrepresentation, a parent or person standing in loco parentis to such person under 18 years of age shall be a proper party plaintiff in an action to annul said marriage. (R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608.)

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Bigamous Marriages Are Void. — A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Wife who knowingly entered a bigamous marriage was subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct; therefore, the trial court correctly terminated husband's obligation to pay alimony under the separation agreement. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Applied in Heiser v. Heiser, 71 N.C. App. 223, 321 S.E.2d 479 (1984).

ARTICLE 2.

Marriage Licenses.

§ 51-7. Penalty for solemnizing without license.

Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars ($200.00) to any person who sues therefor, and he shall also be guilty of a Class 1 misdemeanor. (R.C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C.S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5; 1993, c. 539, s. 415; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 415, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§§ 51-9 through 51-11: Repealed by Session Laws 1994, c. 647, ss. 1-3, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6 provides that ss. 1 to 3, which repealed these sections, apply to marriage license applications filed on or after that date.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27, effective January 1, 1986.

§ 51-13: Repealed by Session Laws 1994, c. 647, s. 4, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6, provides that s. 4, which repealed this section, applies to marriage license applications filed on or after that date.

The repealed section was amended by Session Laws 1993, c. 539, s. 416, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. The section is set out above as repealed.

§ 51-15. Obtaining license by false representation misdemeanor.

If any person shall obtain a marriage license by misrepresentation or false pretenses, he shall be guilty of a Class 3 misdemeanor. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4; 1993, c. 539, s. 417; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 417, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

(a) When it shall appear to the register of deeds of any county in this State that the names of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name and names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction.

(b) When the name of a party to a marriage has been changed by court order as the result of a legitimation action or other cause of action, and the party whose name is changed present a signed affidavit to the register of deeds indicating the name change and requesting that the application for a marriage license, the marriage license, and the marriage certificate of the officiating officer be amended by substituting the changed name for the original name, the register of deeds may amend the records as requested by the party, provided the other party named in the records consents to the amendment. (1953, c. 797; 1959, c. 344; 1987, c. 576.)

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.
52-11. Antenuptial contracts and torts.

§ 52-3. Married person may insure spouse's life.

CASE NOTES

Insurable Interest in Spouse's Life. — This section does not create in a wife an insurable interest in the life of her husband. She has such an interest without the benefit of the section. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991).

Right to Insure Spouse's Life Without Consent. — This section gives married persons the right to insure their spouses' lives without their consent. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991), distinguishing Acme Mfg. Co. v. McCormick, 175 N.C. 277, 95 S.E. 555 (1918).

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

CASE NOTES

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Construction With Other Provisions. — This section and § 52-10.1 are distinguishable in that a separation agreement may affect support rights whereas this section refers only to "rights ... in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under this section may be entered into at any time during marriage, not only in contemplation of separation or divorce. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd, 343 N.C. 299, 469 S.E.2d 553 (1996).

Those contracts between spouses which conflict with public policy are void. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd, 343 N.C. 299, 469 S.E.2d 553 (1996).

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of § 52-10.1, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

§ 52-10.1. Separation agreements.

Legal Periodicals. —

For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

CASE NOTES

Construction With Other Sections. — Section 52-10 and this section are distinguishable in that a separation agreement may affect support rights whereas § 52-10 refers only to "rights ... in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under § 52-10 may be entered into at any time during marriage, not only in contemplation of separation or divorce. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd, 343 N.C. 299, 469 S.E.2d 553 (1996).

Separation Agreements Binding. — Under this section separation agreements are binding in all respects so long as they are not inconsistent with public policy and parties may, in settling disputes, agree to the payment of attorney's fees. Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994), petition denied as to additional issues, 339 N.C. 609, 454 S.E.2d 246, aff'd, 341 N.C. 702, 462 S.E.2d 219 (1995).

Presumption of Validity of Acknowledgment. — To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of this section, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

Attorneys Fees. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Provision for recovery of attorney's fees in separation agreement was not inconsistent with public policy and was legal, valid, and binding under this section. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Separation Agreement Not Shown. — Where document recited that on the date of execution, the parties were "living separate and apart", however, it further provided that the parties may desire to resume cohabitation in an effort to reconcile and that the parties were considering the resumption of cohabitation, the express and unambiguous language of the agreement declared that the parties were not contemplating living "separate and apart forever." Thus, the agreement was not a separation agreement under this section. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd, 343 N.C. 299, 469 S.E.2d 553 (1996).

§ 52-10.2. Resumption of marital relations defined.

CASE NOTES

There are two lines of cases regarding resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element; these two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Future, but Not Existing, Alimony Obligations Cease upon Reconciliation. — When the parties resumed marital relations, appellant's obligations to pay alimony in the future ceased. His duty under the consent judgment to pay alimony up to the date of reconciliation, however, as an executed portion of the consent judgment, remained enforceable through the court's contempt power. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

§ 52-11. Antenuptial contracts and torts.

The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C.S., s. 2517; 1965, c. 878, s. 1.)

Editor's Note. —
This section has been set out above, as it was inadvertently omitted from the main pamphlet.

Chapter 52B.
Uniform Premarital Agreement Act.

Sec.
52B-7. Enforcement.

Editor's Note. — The official commentary to this Act has been printed in the main volume through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Act may be ordered from them at 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.

§ 52B-1. Short title.

Legal Periodicals. — For article, "North Carolina's Uniform Premarital Agreement Act, A Contract Perspective," see 12 Campbell L. Rev. 221 (1990).

For comment, "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," see 28 Wake Forest L. Rev. 1037 (1993).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

§ 52B-2. Definitions.

CASE NOTES

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-3. Formalities.

CASE NOTES

Acknowledgment Not Required. — The Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

§ 52B-6. Amendment, revocation.

CASE NOTES

A cancellation of wedding plans does not automatically nullify the provisions of a prenuptial agreement in the event the parties subsequently reconcile and marry. In re Estate of Pate, 119 N.C. App. 400, 459 S.E.2d 1 (1995).

§ 52B-7. Enforcement.

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) That party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. Before the court orders support under this subsection, the court must find that the party for whom support is ordered is a dependent spouse, as defined by G.S. 50-16.1A, and that the requirements of G.S. 50-16.2A regarding postseparation support or G.S. 50-16.3A regarding alimony have been met.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law. (1987, c. 473, s. 1; 1995, c. 319, s. 11.)

Cross References. — As to postseparation support, see § 50-16.2A.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12, provides: "This act shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to civil actions filed on or after that date, substituted "G.S. 50-16.1A, and that the requirements of G.S. 50-16.2A regarding postseparation support or G.S. G.S. 50-16.3A regarding alimony have been met" for "G.S. 50-16.1, and that there are grounds for alimony under G.S. 50-16.2 or alimony pendente lite under G.S. 50-16.3".

CASE NOTES

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Party Claiming Invalidity Has Burden of Proof. — In an action to enforce a premarital agreement executed prior to enactment of Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Presentation of a premarital agreement to wife on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, did not amount to duress and undue influence. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Premarital Agreement Was Not Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Foreign Contract. — Syrian contract would not be viewed as a premarital agreement limiting plaintiff's relief under the laws of North Carolina because the contract, signed by plaintiff's father as her agent, did not meet the requirements of this chapter. Atassi v. Atassi, 117 N.C. App. 506, 451 S.E.2d 371, cert. denied, 340 N.C. 109, 456 S.E.2d 310 (1995).

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-9. Limitation of actions.

CASE NOTES

Cited in Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1996

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1996 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
Attorney General of North Carolina

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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1996

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1996 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina